Supreme Court, U. S.
FILED
AUG 18 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1359

BANKERS TRUST COMPANY,

Petitioner,

vs.

SAMUEL MALLIS and FRANKLYN KUPFERMAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 4, 1977
CERTIORARI GRANTED MAY 23, 1977

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Relevant Docket Entries.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

POLLACK, J.

PLAINTIFFS

MALLIS, SAMUEL
KUPFERMAN, FRANKLYN

DEFENDANTS

FEDERAL DEPOSIT INSURANCE CORPORATION
EUROPEAN AMERICAN BANK & TRUST COMPANY
FRANKLYN NATIONAL BANK
BANKERS TRUST COMPANY

CAUSE

Viol. of Securities Act of 1933.

ATTORNEYS

DATE	PROCEEDINGS
2-24-75	Filed complaint and issued summons.
2-26-75	Filed Order to Show Cause for preliminary Injunction & Temporary Restraining Order.
4-11-75	Filed deft's ANSWER.
4-14-75	Filed Stip & Order extending time of defts Franklin National Bank & Federal Deposit Insurance Corp to answer complaint to 4/18/75. Pollack, J.
4-17-75	Filed Stip & Order adjourning motion of deft. European American Bank & Trust Co. for an order of dismissal of count 1 & for summary

Relevant Docket Entries.

Date	Proceedings
	judgment as to count II of Complaint to 4/18/75.
4-23-75	Filed Stip. & Order that the time for defts. Franklin National Bank and Federal Deposit Insurance Corp. as Receiver of Franklin National Bank to answer the complaint is ext. to 4-25-75. Pollack, J.
4-25-75	Pretrial before Pollack, J.
5-06-75	Filed Pltffs Notice to take deposition of John Murfitt. Issued Subpoena.
9-25-75	Pretrial before Pollack, J.
9-30-75	(recd this date) Filed Deft. Federal Deposit Insurance Corporation Notice of Motion. re: order dismissing Count 1 of complaint ret. 8/25/75. (recd this date) Filed Deft. Bankers Trust Company re: order dismissing Count III of complaint upon grounds pleading fails to state a claim ret. 8/25/75.
9-30-75	(recd this date) Filed Affdvt by Samuel Mallis & Franklyn Kupferman for pltff in opposition to motion of Deft. European American Bank & Trust Company for dismissal of complaint.
9-30-75	Filed Affdvt of Nathan Silverman for Deft. Bankers Trust Company in answer to Pltff's Memorandum of Law.
9-30-75	Filed Affdvt of Nathan Silverman for Deft. Bankers Trust Company re: furnish pltffs' atty with factual information in order to enable him to respond to same on or before 5/5/75.

Relevant Docket Entries.

Date	Proceedings
9-30-75	Filed Opinion #43153. It appears that FNB is an insolvent, whose interests have passed to FDIC and/or EA, and thus seems appropriate to terminate this litigation in this Court by dismissing claims as to FNB as well. Complaint dismissed in its entirety. So Ordered. Pollack, J. (mn)
10-02-75	Filed Opinion #43187. Since filing of decision in this case, deft. Federal Deposit Insurance Corporation has called Court's attention to 12 USC, Sec. 1819 (1970) which authorizes suit against this deft in federal courts on state law claim. Accordingly, dismissal of Count against this deft is set aside and liability or any other matter pertaining to that claim alone may be reargued. Counsel should submit briefs accordingly within 10 days hereof. So Ordered. Pollack, J.)mn)
10-31-75	Filed pltffs' notice of appeal from order dismissing the complaint as against defts. European-American Bank & Trust Co., Franklin National Bank and The Bankers Trust Co. mailed copies.
11-12-75	Filed letter dated May 6-75 to Judge Pollack with attachment.
11-12-75	Filed Notice that orig. record cert. & transmitted to USCA.
11-25-75	Filed Pltffs Affdvt & Notice of motion re: directing entry of final Judgment as against defts other than Federal Deposit Insurance Corp. so as to permit appeal to Court of Appeals from said dismissals, ret. 12/15/75.

Relevant Docket Entries.

Date	Proceedings
11-28-75	Filed memo End. on motion of 11/25/75. Application for certificate under 28 USC 1292(b) is denied. Motion to enlarge the time as requested to serve, the notice of appeal served, without reference to validity thereof or appeal, ability of the order of 9/30/75. So Ordered, Pollack, J. (mn)
12-15-75	Filed Memo End. on motion of 11/26/75. There is no just reason for leaving a claim against FDIC hanging in limbo and creating piece meal appellate litigation. If there is a viable claim that pltffs intend to pursue against FDIC in matter asserted it should be concluded by trial or other determination so that a complete record is available on all related claims. If pltffs choose not to pursue FDIC albeit it was named in the complaint, the claim may be dismissed for lack of prosecution or withdrawn by pltff but it should be terminated appropriately. Motion denied. Pollack, J. (mn)
12-23-75	Filed true copy of USCA that pltff's notice of appeal is withdrawn. Clk.
03-02-76	Filed Stip & Order that complaint is dismissed with prejudice as against deft. Federal Deposit Insurance Corporation & counterclaim asserted by same as receiver of Franklin National Bank is dismissed with prejudice as against all pltffs, to be without costs in favor of any party against any other. Pollack, J.

Relevant Docket Entries.

Date	Proceedings
03-02-76	Filed Stip & Order that in connection with Stipulation of Dismissal of Complaint as to Federal Deposit Insurance Corporation & of counterclaim filed, pltffs will make no personal claim as against Franklin National Bank, no money judgment as against same, etc. Pollack, J.
03-18-76	Filed Letter dated 11/26/75 from attys for Bankers Trust Co.
03-18-76	Filed Letter dated 10/1/75 from pltff's atty. with atchd deposition.
03-24-76	Filed Pltffs Notice of Appeal from Order and Judgment of Hon. Milton Pollack, dismissing complaint as against defts. European-American Bank & Trust Company, Franklin National Bank and the Bankers Trust Company (copy mailed to Hughes, Hubbard & Reed; Sullivan & Cromwell & Charles Leeds on 3/25/76)
04-12-76	Filed Notice that record on appeal certified & transmitted to USCA.

Complaint.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAMUEL MALLIS and FRANKLYN KUPFERMAN,

Plaintiffs,

—against—

FEDERAL DEPOSIT INSURANCE CORPORATION, EUROPEAN AMERICAN BANK & TRUST COMPANY, FRANKLIN NATIONAL BANK and BANKERS TRUST COMPANY,

Defendants.

Plaintiffs, complaining of the defendants, by their attorneys, Hauser & Rosenbaum, P.C., respectfully allege:

FIRST COUNT

First: The jurisdiction of this Honorable Court is invoked pursuant to the Securities Act of 1933, §§ 12-17, and the laws of the United States creating the Board of Governors of the Federal Reserve System and empowering them to enact regulations, particularly Regulation U, 12 C.F.R. 221, et seq., and 15 U.S.C. 78 cc.

Second: Upon information and belief, Franklin National Bank (Franklin) was and is a domestic banking corporation. At all times here material, it conducted a banking business and was subject to the Securities Act of 1933 and the aforesaid Regulation U, 12 C.F.R. 221, et seq.

Third: Upon information and belief, Bankers Trust Company (Bankers) was and is a domestic banking corporation. At all times here material, it conducted a banking business and was subject to the Securities Act of 1933 and the aforesaid Regulation U, 12 C.F.R. 221, et seq.

Fourth: Upon information and belief, European American Bank & Trust Company (European) was and is a domestic banking corporation. At all times here material, it conducted a banking business and was subject to the Securities Act of 1933 and the aforesaid Regulation U, 12 C.F.R. 221, et seq.

Fifth: Upon information and belief, the defendant Federal Deposit Insurance Corporation (Federal) was and is a corporation duly organized and existing under the laws and statutes of the United States, and was and is acting as Receiver and Liquidator of the defendant, Franklin, and it is named as a defendant in such capacity.

Sixth: Upon information and belief, defendants European and Federal are successors in interest to the defendant Franklin, and either or both defendants have assumed all rights and obligations of the said Franklin.

Seventh: On or about March 2, 1972, Franklin advanced to or for the account of one Jerome Kates and one Judith Kates $156,748.00, receiving in return certain documents purporting to represent 40,384 shares of the common stock of Equity National Industries, Inc.

Eighth: The said common stock certificates of Equity National Industries, Inc. and the interests represented thereby, were not registered as required by the Securities Act of 1933, and the transfer thereof violated the aforesaid Act of 1933.

Ninth: The advancement of funds by Franklin to or for the account of Jerome Kates and Judith Kates was pur-

portedly for the account of the plaintiff Mallis in the sum of approximately $78,000.00, and purportedly for the account of plaintiff Kupferman in the sum of approximately $78,000.00, and was purportedly intended by Franklin as a loan to each of the plaintiffs in the sums stated to enable plaintiffs to lend or advance the said sums to or for Jerome and Judith Kates. Defendant Franklin knew and understood that there was to be received in return 40,384 shares of the common stock of Equity National Industries, Inc. by way of security for the payment of certain sums of money to plaintiffs and Franklin.

Tenth: Upon information and belief, the aforesaid Regulation U, 12 C.F.R. 221, prohibited the making of a loan or advance to or for the plaintiffs or otherwise, for the purposes intended.

Eleventh: As a condition to the making of the purported loan or advance by the defendant Franklin for the account of plaintiffs, Franklin required the plaintiffs to execute notes in favor of Franklin and further required that the promise of payment of the aforesaid notes be collateralized by each of the plaintiffs with a pledge of their respective bankbooks, securities, etc.

Twelfth: Defendant Franklin, its agents, servants and employees, fraudulently or negligently failed to disclose to the plaintiffs that it was prohibited from loaning or advancing monies for the account of the plaintiffs, or otherwise, for the purposes intended.

Thirteenth: By virtue of transactions between and amongst defendants Franklin, Federal and European, concerning which plaintiffs have no information, defendant European is now the holder of the notes or renewals thereof, executed by plaintiffs in favor of defendant Franklin,

as well as the collateral pledged in connection therewith. Upon information and belief, the defendant Federal has or may have a contingent interest in the aforesaid notes and collateral and the disposition thereof.

Fourteenth: Plaintiffs seek rescission of the aforesaid transaction, as well as declaratory judgment that the said transaction and any notes or other evidences of indebtednesses executed by plaintiffs, or either of them in connection therewith are null and void and are of no force and effect. Plaintiffs furthermore seek an Order and Judgment of the Court directing the return of all collaterals owned by them and possessed by the defendants, or any of them. Plaintiffs furthermore seek a preliminary injunction restraining the defendants from further transferring by any manner or means whatever, the aforesaid notes or other evidences of indebtednesses and the property of the plaintiffs purportedly held by the defendants as collateral in connection therewith.

Fifteenth: Plaintiffs have no adequate remedy at law.

COUNT II

Sixteenth: Preliminary to the payment by defendant Franklin to or for the account of Jerome and Judith Kates, purportedly for and in behalf of plaintiffs, Franklin, its agents, servants and employees, represented to the plaintiffs that Franklin investigated to determine the reputation of the said Jerome Kates and Judith Kates and the genuineness and value of the common stock of Equity National Industries, Inc., which were to be received in conjunction with the proposed transaction. Franklin, its agents, servants and employees, represented and reported to the plaintiffs that the said Jerome Kates and Judith Kates enjoyed a good reputation in the business com-

munity, that the 40,384 shares of the common stock of Equity National Industries, Inc. to be received were genuine, marketable, free of restrictions, and having a value convertible to cash in thirty days in an amount far in excess of $156,000.00.

Seventeenth: The plaintiffs relied on each of the foregoing representations in agreeing to have the defendant Franklin advance funds for the purposes described.

Eighteenth: The aforesaid statements and representations made by Franklin, its agents, servants and employees, were false and were either fraudulently or negligently uttered. The 40,384 shares of the common stock of Equity National Industries, Inc. represented by Certificates #s U-1828 and U-1833 to be received, reflected on their face that they were not registered as required by the Securities Act of 1933 and that they were subject to the provisions of a certain agreement which prohibited the transfer, pledge or hypothecation of the aforesaid securities, all of which was well known to the defendant Franklin.

Nineteenth: The aforesaid stock certificates were received by the defendant Franklin, its agents, servants and employees, contemporaneously with the payment by the defendant Franklin of the sum of $156,784.00, purportedly for the account of the plaintiffs at a closing attended by an officer of Franklin in behalf of the plaintiffs who did not attend in reliance upon the assurances theretofore received by them from the defendant Franklin, its agents, servants and employees.

COUNT III

Twentieth: Prior to March 2, 1972, defendant Bankers held as collateral for monies loaned to one, Jerome Kates

and one, Judith Kates, Certificates #s U-1828 and U-1833 of Equity National Industries, Inc., representing 40,384 shares of the common stock of the issuer.

Twenty-First: Upon information and belief, defendant Bankers was prohibited by the Securities Act of 1933 from receiving the aforesaid stock certificates and the interests thereby represented as collateral securities for a loan to the said Jerome Kates and Judith Kates.

Twenty-Second: Upon information and belief, defendant Bankers was further prohibited by the Securities Act of 1933 from disposing of the aforesaid securities, except to redeliver the same to the said Jerome Kates or Judith Kates, or the issuer.

Twenty-Third: The provisions of the Securities Act of 1933 to the contrary notwithstanding, defendant Bankers transferred the aforesaid securities to plaintiffs, or their nominee, all in violation of the Securities Act of 1933, in return for which Bankers received from Franklin the sum of $45,000.00, purportedly paid by Franklin to Bankers as part of the proceeds of a loan by Franklin to plaintiffs.

Twenty-Fourth: The acts and conduct of the defendant Bankers, did upon information and belief, violate the Securities Act of 1933.

Twenty-Fifth: That by reason thereof, plaintiffs have been damaged in the sum of $45,000.00.

WHEREFORE, plaintiffs seek a judgment and decree of this Court as follows:

(a) Adjudging, decreeing and declaring that the purported loans and advances made by Franklin allegedly for and in behalf of the plaintiffs were illegal and improper

and plaintiffs are not liable for the payment of any sums whatever to Franklin or its successors in interest, European and Federal.

(b) Directing that all sums paid by plaintiffs to Franklin, and its successors in interest, including payments on account of principal and payments on account of interest should be returned to plaintiffs.

(c) Enjoining during the pendency of this action and permanently the further transfer of any notes or other evidences of debt executed by the plaintiffs, and either of them, in favor of Franklin, or any successor in interest, and arising out of the transactions described in this Complaint.

(d) Directing the return of all collaterals delivered by the plaintiffs to Franklin, and to any successor in interest, to Franklin.

(e) Directing the delivery to the Court for destruction of all evidences of debt executed by the plaintiffs in favor of Franklin and any successor in interest thereof, arising from the transactions described in this Complaint.

(f) A money judgment against Bankers in the sum of $45,000.00.

(g) The costs and disbursements of this action.

Dated: Brooklyn, New York
February 21, 1975

HAUSER & ROSENBAUM, P.C.

By .....
A Member of the Firm
Attorneys for Plaintiffs

Order to Show Cause.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

It appearing from the Summons and Complaint and the affidavit of plaintiffs, Samuel Mallis and Franklyn Kupferman, sworn to February 21, 1975 and of Noel Hauser, sworn to February 24, 1975 that an action has been commenced by plaintiffs to rescind and declare void a certain loan transaction between them and the defendant, Franklin National Bank; and it further appearing that in the event such relief is granted plaintiffs will be entitled to the return of negotiable instruments and other evidences of debt executed by them; and it further appearing that the negotiation of negotiable instruments executed by plaintiffs may prejudice the rights of the plaintiffs and frustrate the policy of Federal Law, it is

ORDERED, that the defendants be and they are hereby directed to show cause before this Court at a Term for Motions thereof to be held in Room 906, on the 25 day of February, 1975, at 3 P.M. o'clock in the forenoon thereof, at the United States Courthouse, Foley Square, New York, New York,

WHY, an order should not be made and entered herein granting plaintiffs a preliminary injunction restraining the defendants from the negotiation or other transferral of negotiable instruments executed by the plaintiffs in favor of Franklin National Bank on March 3, 1972 and why an injunction should not be granted further restraining the

Order to Show Cause.

negotiation of any notes executed by plaintiffs by way of renewal of such notes.

It is further ordered that personal service of this order to show cause & papers therein be made on defendants or their attorneys by 4 P.M. on 2/24/75.

MILTON POLLACK
United States District Judge
USDJ

Dated: New York, N.Y.
2/24/75
Issued at 1:30 P.M.

Affidavit of Samuel Mallis and Franklyn Kupferman, in Support of Order to Show Cause.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF KINGS } ss.:

SAMUEL MALLIS and FRANKLYN KUPFERMAN, both being duly sworn, do depose and say:

1. That they are the plaintiffs in the instant action and that they make this affidavit in support of an application for an Order granting a temporary injunction restraining the enforcement and transfer by negotiation or otherwise, by the defendants Franklin National Bank (Franklin), Federal Deposit Insurance Corporation (Federal) and European American and Trust Company (European) of said notes or evidences of indebtednesses executed by the plaintiffs in favor of Franklin and/or European during the pendency of this action; and further enjoining them from disposing of certain collateral owned by plaintiffs and possessed by the said defendants, or some of them. The instant action is brought for rescission of a certain loan made by Franklin to plaintiffs and for declaratory judgment that the loan is of no force and effect because made in violation of Regulation U promulgated by the Board of Governors of the Federal Reserve System, as well as for other reasons, more particularly hereinafter described, and described in the Complaint hereto annexed.

2. Plaintiff, Franklyn Kupferman, resides at 15 Belmont Drive South, Roslyn Heights, N.Y. and plaintiff,

Samuel Mallis, resides at 19 Peacock Drive, Roslyn, New York. Both are professional dentists unfamiliar with financial matters and with sophisticated securities, regulations and trading. Defendant, Federal, has its office at 345 Park Avenue, New York, New York; defendant, European, has its office at 10 Hanover Square, New York, New York; defendant, Franklin, has its office at 450 Park Avenue, New York, New York; and defendant, Bankers Trust Company (Bankers) has its office at 16 Wall Street, New York, New York.

3. On March 1, 1972, Plaintiff Samuel Mallis was approached by one Jack J. Arnold, known to plaintiff Mallis as an attorney in the City of New York. Arnold represented to Mallis that he or one John Fowler, an officer of Love & Company, a securities broker, had entered into an agreement with one Jerome Kates and his wife Judith Kates to purchase 40,384 shares of unregistered securities issued by Equity National Industries, Inc. for a price of approximately $181,000.00; that Arnold and Fowler or Love & Company had already advanced $25,000.00 toward the purchase of these securities; that an additional sum of approximately $156,000.00 was required within several days thereafter to consummate the purchase; that while the securities were unregistered, the Securities Exchange Commission had theretofore recently promulgated a Regulation which permitted the trading of these securities as if registered; and that the value of the approximately 40,000 shares of Equity National Industries, Inc. (Equity) when traded at the then market price was several times the purchase price of $181,000.00 Arnold advised Mallis that he and Fowler or Love & Company were offering a finder's fee of $50,000.00 to a finder who could produce a lender willing to advance $156,000.00 for thirty days, the loan to be collateralized by the aforesaid 40,000 shares of Equity.

4. Plaintiff Mallis did not have funds of this magnitude and in any event, was not interested in lending money for any purpose; additionally, plaintiff Mallis was not interested in any finder's fee and so advised Arnold; however, he assured Arnold that he would make inquiries among his personal friends, relatives and associates in an attempt to locate a lender willing to participate in this transaction. Accordingly, plaintiff communicated with, amongst others, his brother-in-law, the plaintiff Kupferman, who in turn referred plaintiff Mallis to one John Murfitt, an officer of Franklin. Murfitt was advised, as Mallis had been advised, that time was of the essence. Mallis further advised Murfitt that he had no interest whatever in participating in the transaction or in earning a finder's fee.

5. On March 2, 1972, Murfitt communicated with plaintiffs. He stated that he had investigated the transaction in detail; that the transaction appeared regular in all respects, and as had been represented to Mallis by Arnold. However, Murfitt further represented that Franklin would be unable to advance the funds to Arnold or Fowler or Love & Company because Franklin had no relationship with any of them. He thereupon went on to point out that Franklin would be happy to advance the funds for the account of plaintiffs, since plaintiffs were known to Franklin and to Murfitt, and that in so doing, plaintiffs would receive the finder's fee. This was the first suggestion by anyone that plaintiffs themselves participate in the transaction.

6. Plaintiffs advised Murfitt that they would be absolutely unwilling to act as principals in the transaction, unless they received an absolute assurance from Murfitt and Franklin that they could suffer no loss since they were not in the finance business and had made no investigation whatever regarding the nature of the transaction. Murfitt

thereupon responded that the transaction was one which was absolutely regular and of the character conducted regularly in the ordinary course of business by Franklin and he, in fact, recommended that plaintiffs become the borrowers so as to facilitate Franklin's advancement of the funds as required by Arnold, Fowler and Love & Company. The understanding was that the monies to be advanced by the bank were to be repaid within thirty days and that the Equity securities would be held as collateral for the loan and the finder's fee during that period.

7. Plaintiffs were unaware until very recently that Regulation U prohibited the bank's loaning of monies for this purpose.

8. On March 3, 1972, plaintiffs attended at Franklin and executed the necessary documents whereby in form they made application to Franklin to each borrow the sum of approximately $78,000.00. The loans were then completely unsecured. Since Murfitt indicated that there was no occasion for them to attend the closing at which time the monies would be paid and the stock certificates received, plaintiffs did not attend the closing, but rather Murfitt, in behalf of Franklin, attended. While plaintiffs do not know the same to be the fact since they were not present, they assume that Franklin actually paid out the sums represented by Franklin to be paid out, to wit, the sum of $156,748.00. In return, there was received Stock Certfiicate #U-1833 and Stock Certificate #U-1828 purporting to represent respectively, 29,821 and 10,563 shares of common stock of Equity National Industries, Inc.

9. The monies were, of course, not repaid as agreed. Franklin, and its successors in interest, European, has taken the position and now takes the position that plaintiffs are liable for the said sum of $156,000.00 less $50,000.00 paid on account plus all interest. In addition, Franklin demanded and received of plaintiffs collateral, which they received of plaintiffs and now hold. Said collateral consists of bankbooks, negotiable securities, etc.

10. Plaintiffs do not have all of the documents relating to the within transaction. However, there are annexed hereto the following documents which support the allegations of the instant affidavit:

EXHIBIT "A": A Purchase Agreement whereby Jerome B. Kates and Judith Kates agree to sell the approximately 40,000 shares of Equity National Industries, Inc. to Jack Arnold (the attention of this Honorable Court is invited to ¶ "4" thereof which obligates Arnold to execute a "Letter of Investment"; however, no such Letter of Investment was requested to be signed by the plaintiffs, or either of them, and no such letter was, in fact, signed.

EXHIBIT "B": Front and reverse sides of Franklin National Bank Official Checks #773582, 773583 and 773584, all signed by the aforesaid John Murfitt in behalf of Franklin aggregating the sum of $156,748.00. The attention of this Honorable Court is invited to the fact that none of the checks was approved for payment by the plaintiffs, or either of them; nor do they bear the endorsement of the plaintiffs.

EXHIBIT "C": Front and reverse sides of Certificates #s U-1828 and U-1833 of the common stock of Equity National Industries, Inc. issued in the names of Jerome Kates and Judith Kates. The attention of this Honorable Court is invited to the fact that the securities bear evidence on their face that they are not registered under the

Securities Act of 1933. The endorsement side of each of the certificates reflect that they are further subject to an Escrow Agreement and that the certificates "may not be sold, transferred, pledged or hypothecated except in accordance with such Escrow Agreement, a copy of which may be examined at the office of the corporation." Upon information and belief, the Escrow Agreement was never examined by John Murfitt or by any representative of Franklin. Since plaintiffs were not present at the closing, they never saw the certificates and more particularly, the caveat prohibiting their sale until after the funds had actually been disbursed. Upon information and belief, the certificates in question were only conditionally issued by Equity National Industries, Inc. and were to be deemed null and void and were subject to cancellation in the event certain conditions set forth in the agreement therein referred to were not met. Upon information and belief, these conditions were, in fact, not met, and the certificates in question are indeed null and void and have been cancelled as more particularly hereinafter appears.

Exhibit "D": A copy of a Summons and Complaint issued out of the Chancery Court of the State of Delaware by Equity National Industries, Inc. as plaintiff, naming both Samuel Mallis, a plaintiff herein, and the said defendant, Franklin National Bank, amongst others, wherein it is alleged, *inter alia,* that the securities in question were issued conditionally only (the conditions presumably being spelled out in the agreement to which reference is made on the endorsement side of the stock certificates (Exhibit "C"); that the conditions had not been met and that the securities in question should be declared null and void by the Chancery Court of the State of Delaware. Upon information and belief, such an adjudication has, in fact, been entered.

11. Plaintiffs are informed by their attorneys and believe that the conduct of Franklin, its agents, servants and employees, in advancing the funds for the purposes described not only violated the Securities Act of 1933 and Regulation U of the regulations promulgated by the Board of Governors of the Federal Reserve System, but that, additionally, it was in the circumstances the absolute duty and responsibility of Franklin to prevent the plaintiffs from being misled by the acceptance of securities which were only conditionally issued and subject to an agreement which had not been examined.

12. Plaintiffs understand and believe that defendant Franklin is insolvent, but that all of its assets and all of its liabilities have been assumed by the defendant, European, subject to an arangement with the defendant Federal that European may reject certain of the transactions of Franklin giving rise to rights and obligations; and that in such event, the rights and obligations arising therefrom would be assumed by Federal.

13. Plaintiffs believe that they executed negotiable instruments in favor of Franklin and that in the event these instruments are transferred or negotiated to third parties, it is possible that the claims herein asserted may be foreclosed. Under the circumstances, it is respectfully requested that this Honorable Court issue an injunction restraining the negotiation or transfer of any and all negotiable papers and other evidences of indebtedness executed by the plaintiffs, and either or both of them, in favor of the defendants Franklin, European and Federal, and that the injunction further prohibit the transfer or equitable conversion of any of the collateral held by the aforesaid defendants, pending determination of the issues herein presented.

Affidavit of Samuel Mallis and Franklyn Kupferman.

14. No previous application for the relief requested herein has been made.

WHEREFORE, plaintiffs respectfully pray that the annexed proposed Order be signed.

SAMUEL MALLIS
Samuel Mallis

FRANKLIN KUPFERMAN
Franklin Kupferman

Sworn to before me this
21 day of February, 1975.

NOEL HAUSER
Notary Public, State of New York
No. 30-1710850. Qual. in Nassau County
Commission Expires March 30, 1975

Exhibit A Annexed to Affidavit of Mallis and Kupferman.

PURCHASE AGREEMENT

THIS AGREEMENT, made and entered into at New York, New York this 24th day of February, 1972, by and between JEROME B. KATES and JUDITH KATES by Jerome B. Kates, as attorney (hereinafter jointly referred to as the "Seller"), and JACK ARNOLD as attorney (hereinafter referred to as the "Buyer").

WITNESSETH

WHEREAS, Seller is hereby assigning all of its right, title and interest in and to 40,384 shares of duly issued and outstanding shares of the capital stock of Equity National Industries, Inc., a Delaware corporation, and

WHEREAS, the Buyer agrees to pay to the Seller the price of $4.50 per share or the aggregate sum of $181,728.00 by good bank check simultaneously against delivery of stock certificate number 1833 for 29,821 shares of Equity National Industries, Inc. in the name of Jerome B. Kates and certificate number 1828 for 10,563 shares of Equity National Industries, Inc. in the name of Judith Kates, which certificates are presently held by Bankers Trust Co. at 750 Third Avenue, New York, N.Y. and the net sum that the Seller will receive pursuant to this private sale is $181,728.00 to be paid by the Buyer, and Seller acknowledges receipt of $25,000.00 as a partial payment against the price of $181,728.00.

WHEREAS, Seller desires to sell to Buyer, and Buyer desires to purchase from Seller, the number of shares of Equity National Industries, Inc. as hereinabove set forth, on the terms and conditions hereinafter set forth.

Exhibit A Annexed to Affidavit of Mallis and Kupferman.

Now Therefore, in consideration of the mutual promises and agreements hereinafter contained, the parties hereby agree as follows:

1. The Seller unconditionally represents and warrants to make good and valid delivery of the aforementioned certificates of common stock to Buyer as hereinabove set forth.

2. Seller represents and warrants that the aforementioned stock certificates are validly issued, duly authorized and outstanding on the books of Equity National Industries, Inc.

3. Each of the Sellers is the owner of record and beneficially of the number of shares of the common stock of the Company as indicated below:

Name	*Number of Shares Held*
Jerome B. Kates	29,821
Judith Kates	10,563

4. Buyer agrees to execute an "investment letter", in a form mutually satisfactory to the parties herein which will protect the Seller from any Securities and Exchange Commission rules and regulations.

5. Buyer and its successors and assigns will indemnify Seller and hold Seller harmless, at all times after the Closing Date, and defend at its sole cost and expense against any and all loss, damage, liability, claim or suit presently pending or in the future arising out of this transaction.

Exhibit A Annexed to Affidavit of Mallis and Kupferman.

6. Any and all agreements previously entered into between Seller and any other parties relating to this transaction are declared null and void and this agreement is to survive any and all agreements previously entered into.

7. The closing of this transaction shall take place no later than 2:00 P.M. on February 29, 1972, time being of the essence of this transaction.

In Witness Whereof the parties hereto have duly executed their signatures.

Jerome B. Kates
Jerome B. Kates

Judith Kates
By Jerome B. Kates, Attny.
Jerome B. Kates, Attny.

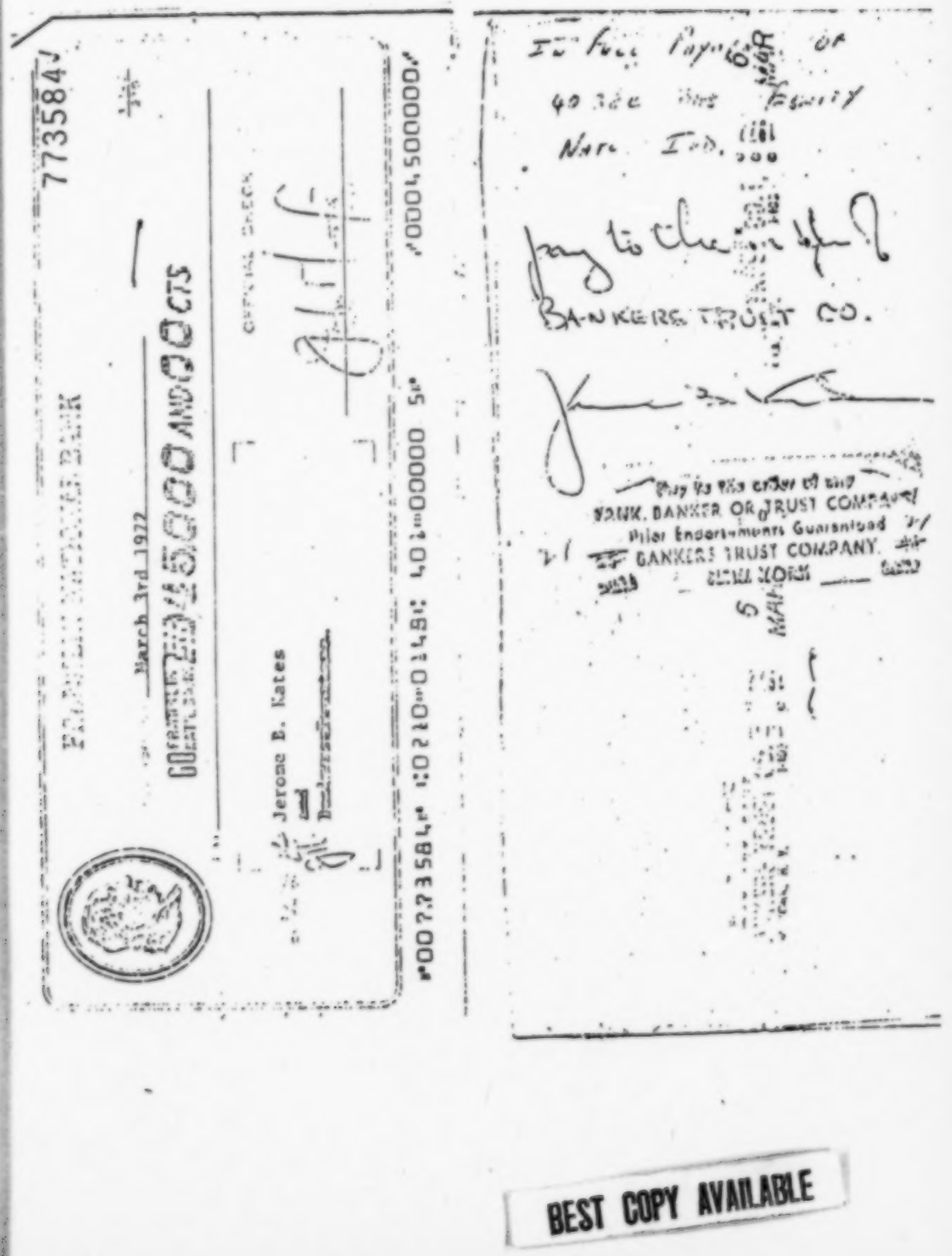
Jack Arnold as Attorney

Exhibit B Annexed to Affidavit of Mallis and Kupferman.

Franklin National Bank official checks #773582, 773583, 773584.

(Photoprint)

[For convenience of Court and Counsel this Exhibit is bound in on the opposite page]



BEST COPY AVAILABLE

Exhibit B Annexed to Affidavit of Mallis and Kupferman.

(continued)

(Photoprint)

[*For convenience of Court and Counsel this Exhibit is bound in on the opposite page*]

BEST COPY AVAILABLE

Exhibit B Annexed to Affidavit of Mallis and Kupferman.

(continued)

(Photoprint)

[*For convenience of Court and Counsel this Exhibit is bound in on the opposite page*]

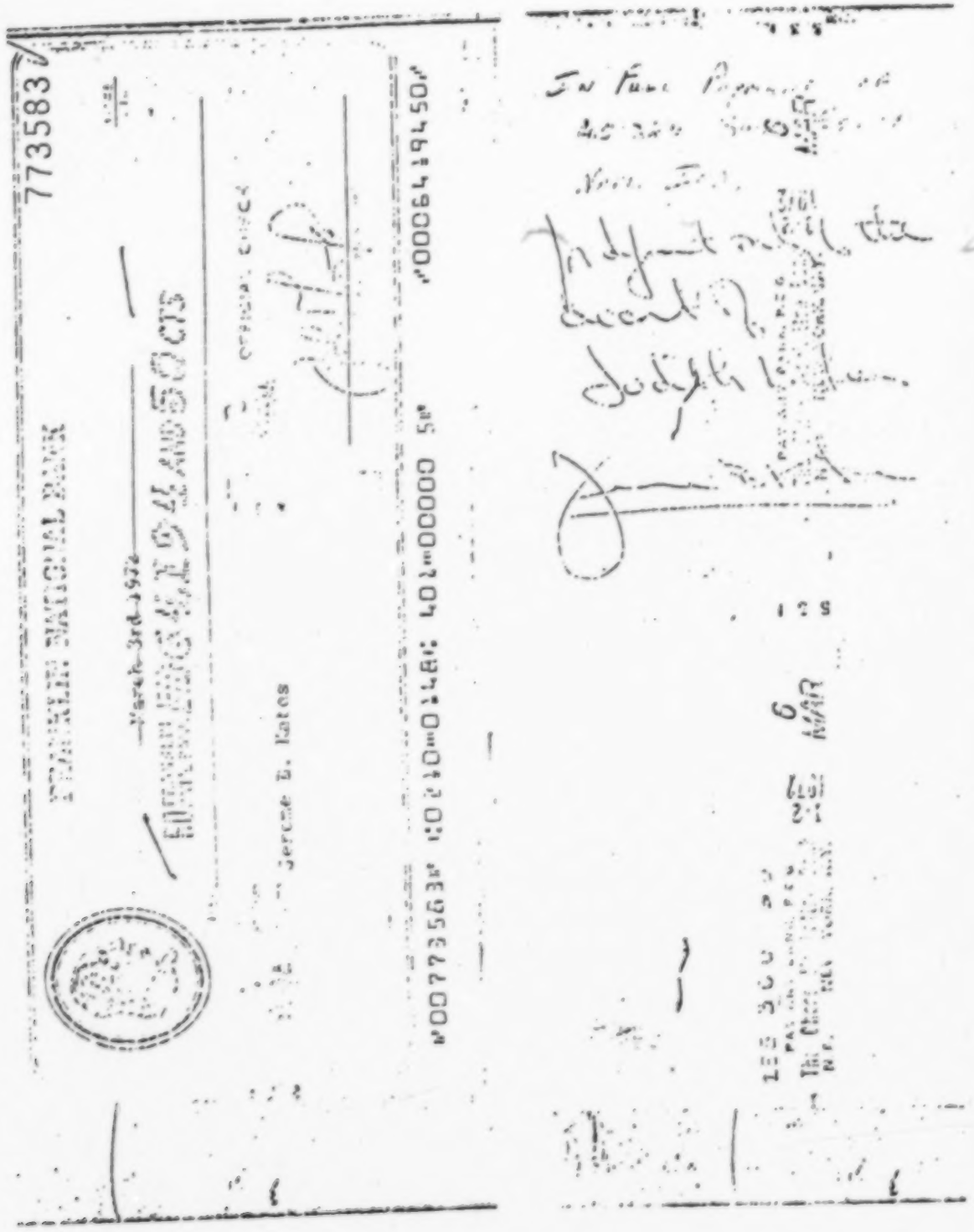


Exhibit C Annexed to Affidavit of Mallis and Kupferman.

Certificates #U-1828 and #U-1833 of the Common Stock of Equity National Industries, Inc.

(Photoprint)

[*For convenience of Court and Counsel this Exhibit is bound in on the opposite page*]

EQUITY NATIONAL INDUSTRIES, INC.

INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE

U 1828

$1.00 PAR VALUE

•••10,563•••

COMMON STOCK

The shares represented by this certificate have not been registered under the Securities Act of 1933. The shares have been acquired for investment and may not be sold, transferred, pledged or hypothecated in the absence of an effective Registration Statement for the shares under the Securities Act of 1933 or an opinion of counsel to the Company that registration is not required under said Act.

THIS CERTIFIES that ••Judith Kates••• is the owner of

•••Ten Thousand-Five Hundred-Sixty Three••• SEE REVERSE FOR CERTAIN DEFINITIONS

FULL PAID AND NON ASSESSABLE SHARES OF THE PAR VALUE OF $1.00 EACH OF THE COMMON STOCK OF

EQUITY NATIONAL INDUSTRIES, INC. transferable on the books of the Corporation by the holder hereof in person or by duly authorized attorney upon surrender of this Certificate properly endorsed. This Certificate and the share or shares represented hereby are issued and shall be held subject to all of the provisions of the Certificate of Incorporation and By-Laws of the Corporation and all amendments thereto, to all of which the holder hereof, by acceptance hereof, assents. This Certificate is not valid unless countersigned by the Transfer Agent.

WITNESS, the seal of the Corporation and the signatures of its duly authorized officers.

Dated: AUG 7 1970

Countersigned:
THE NATIONAL BANK OF GEORGIA
(Atlanta, Georgia) Transfer Agent

By [illegible] Authorized Officer

EQUITY NATIONAL INDUSTRIES, INC. CORPORATE SEAL 1968 DELAWARE

President

Secretary

Exhibit C Annexed to Affidavit of Mallis and Kupferman.

(continued)

(Photoprint)

[*For convenience of Court and Counsel this Exhibit is bound in on the opposite page*]

The shares evidenced by this certificate are subject to the provisions of an Escrow Agreement dated August 7, 1970 among the Corporation, Equity-Take Two, Inc., The National Bank of Georgia and Stanley C. Lesser, as nominee for the former shareholders of Take Two, Inc., and may not be sold, transferred, pledged or hypothecated except in accordance with such Escrow Agreement, a copy of which may be examined at the office of the Corporation.

Dated, ...

Attorney to transfer the said stock on the books of the within-named Corporation with full power of substitution in the premises.

NOTICE: The signature to this assignment must correspond with the name as written upon the face of the Certificate, in every particular, without alteration or enlargement, or any change whatever.

.....

.....

.....

Please print or typewrite name and address including postal zip code of assignee

.....

For value received, ... hereby sell, assign and transfer unto

PLEASE INSERT SOCIAL SECURITY OR OTHER IDENTIFYING NUMBER OF ASSIGNEE

.....

..... Shares

of the capital stock represented by the within Certificate, and do hereby irrevocably constitute and appoint.....

The following abbreviations, when used in the inscription on the face of this certificate, shall be construed as though they were written out in full according to applicable laws or regulations:

TEN COM	— as tenants in common	UNIF GIFT MIN ACT — ..... Custodian .....
TEN ENT	— as tenants by the entirety	(Cust.) (Minor)
JT TEN	— as joint tenants with right of survivorship and not as tenants in common	under Uniform Gifts to Minors Act ..... (State)

Additional abbreviations may also be used though not in the above list.

EQUITY NATIONAL INDUSTRIES, INC.

THE CORPORATION WILL FURNISH WITHOUT CHARGE TO EACH STOCKHOLDER WHO SO REQUESTS, THE DESIGNATIONS, PREFERENCES AND RELATIVE, PARTICIPATING, OPTIONAL OR OTHER SPECIAL RIGHTS OF EACH CLASS OF STOCK OR SERIES THEREOF OF THE CORPORATION, AND THE QUALIFICATIONS, LIMITATIONS OR RESTRICTIONS OF SUCH PREFERENCES AND/OR RIGHTS. SUCH REQUESTS MAY BE MADE TO THE CORPORATION OR THE TRANSFER AGENT.

BEST COPY AVAILABLE

Exhibit C Annexed to Affidavit of Mallis and Kupferman.
(continued)

(Photoprint)

[*For convenience of Court and Counsel this Exhibit is bound in on the opposite page*]

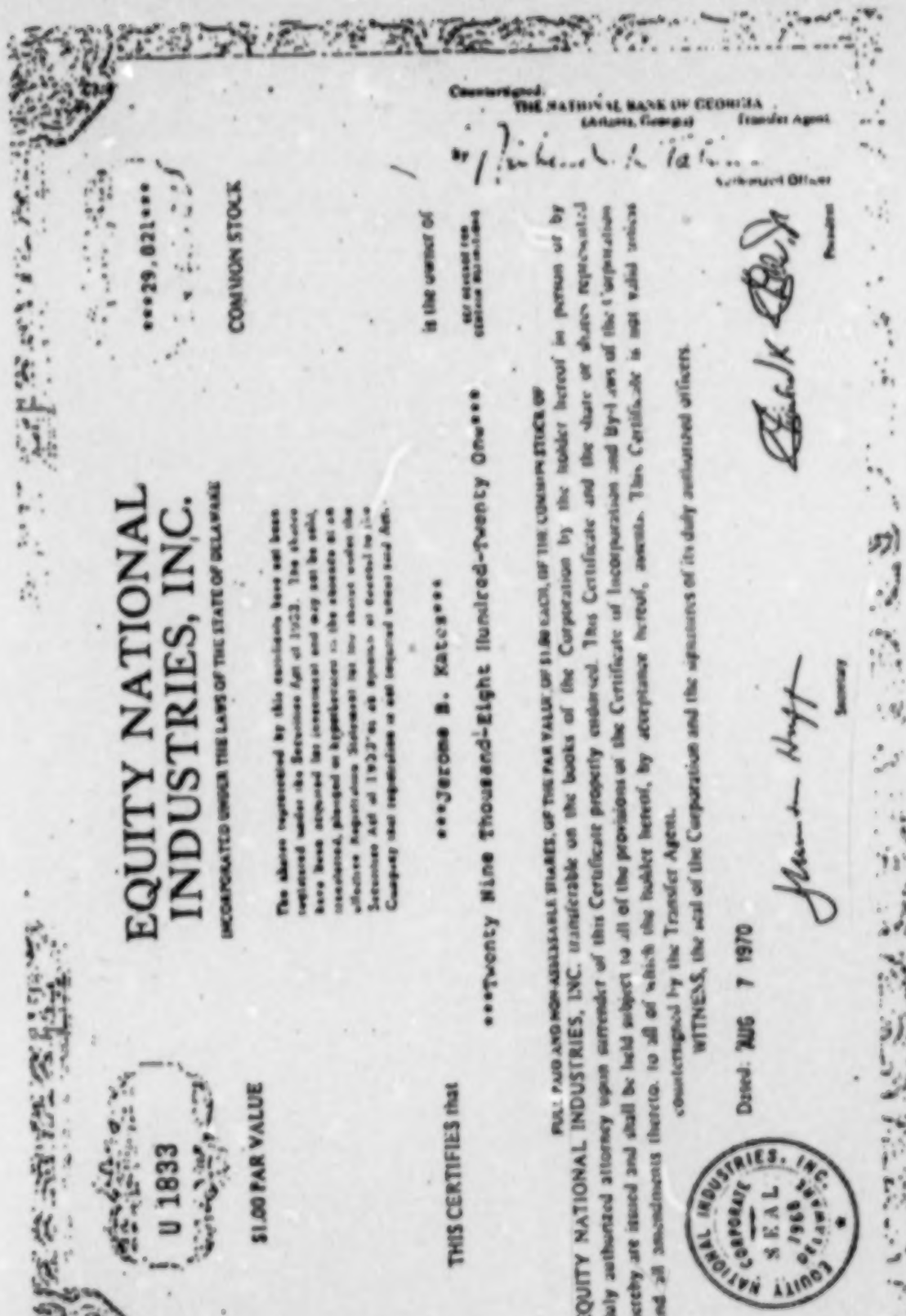


Exhibit C Annexed to Affidavit of Mallis and Kupferman.

(continued)

(Photoprint)

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EQUITY NATIONAL INDUSTRIES, INC.

THE CORPORATION WILL FURNISH WITHOUT CHARGE TO EACH STOCKHOLDER WHO SO REQUESTS, THE DESIGNATIONS, PREFERENCES AND RELATIVE, PARTICIPATING, OPTIONAL OR OTHER SPECIAL RIGHTS OF EACH CLASS OF STOCK OR SERIES THEREOF OF THE CORPORATION, AND THE QUALIFICATIONS, LIMITATIONS OR RESTRICTIONS OF SUCH PREFERENCES AND/OR RIGHTS. SUCH REQUESTS MAY BE MADE TO THE CORPORATION OR THE TRANSFER AGENT.

The following abbreviations, when used in the inscription on the face of this certificate, shall be construed as though they were written out in full according to applicable laws or regulations:

TEN COM	— as tenants in common	UNIF GIFT MIN ACT —	(Cust.) Custodian (Minor) under Uniform Gifts to Minors Act (State)
TEN ENT	— as tenants by the entirety		
JT TEN	— as joint tenants with right of survivorship and not as tenants in common		

Additional abbreviations may also be used though not in the above list.

For value received, _____ hereby sell, assign and transfer unto

PLEASE INSERT SOCIAL SECURITY OR OTHER IDENTIFYING NUMBER OF ASSIGNEE

_____

_____

_____

_____ Shares of the capital stock represented by the within Certificate, and do hereby irrevocably constitute and appoint _____

_____

Attorney to transfer the said stock on the books of the within-named Corporation with full power of substitution in the premises.

Dated, _____

_____

NOTICE: The signature to the assignment must correspond with the name as written upon the face of the Certificate, in every particular, without alteration or enlargement, or any change whatever.

Exhibit D Annexed to Affidavit of Mallis and Kupferman.

Summons and Complaint issued out of the Chancery Court of the State of Delaware by Equity National Industries, Inc.

SUMMONS.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 4510

EQUITY NATIONAL INDUSTRIES, INC., a corporation of the State of Delaware,

Plaintiff,

v.

JEROME B. KATES, JUDITH KATES, MURRAY BERLINER, VITO DOINO, LILLIAN COLLICA, SAMUEL MALLIS, JACK J. ARNOLD, and FRANKLIN NATIONAL BANK, a corporation of the State of New York,

Defendants.

THE STATE OF DELAWARE,

TO THE SHERIFF OF NEW CASTLE COUNTY:

YOU ARE COMMANDED:

To Summon the above named defendant so that, on or before July 1, 1974 defendant shall serve upon Louis J. Finger, Esquire, plaintiff's attorney whose address is 4072 DuPont Building, Wilmington, Delaware 19899 an answer to the complaint.

Exhibit D Annexed to Affidavit of Mallis and Kupferman.

To serve upon defendant a copy hereof and of the complaint.

Dated May 20, 1974

(Illegible)
Register in Chancery

TO THE ABOVE NAMED DEFENDANT:

In case of your failure, on or before July 1, 1974 to serve on plaintiff's attorney named above an answer to the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

(Illegible
Register in Chancery

Exhibit D Annexed to Affidavit of Mallis and Kupferman.

COMPLAINT.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 4510

EQUITY NATIONAL INDUSTRIES, INC., a corporation of the State of Delaware,

Plaintiff,

v.

JEROME B. KATES, JUDITH KATES, MURRAY BERLINER, VITO DOINO, LILLIAN COLLICA, SAMUEL MALLIS, JACK J. ARNOLD, and FRANKLIN NATIONAL BANK, a corporation of the State of New York,

Defendants.

1. Plaintiff (hereinafter referred to as "Equity") is a corporation of the State of Delaware with its principal place of business at Atlanta, Georgia.

2. Plaintiff entered into an Agreement and Plan of Reorganization dated July 23, 1970, with Equity-Take Two, Inc., a Georgia corporation (hereinafter referred to as the "Subsidiary") and Take Two, Inc., a New York corporation (hereinafter referred to as "Take Two"). Said agreement was amended by a further agreement between the parties made as of October 30, 1970.

3. On August 7, 1970, Subsidiary and Take Two entered into a Plan and Agreement of Merger pursuant to which

Exhibit D Annexed to Affidavit of Mallis and Kupferman.

Take Two would be merged into Subsidiary and the stockholders of Take Two would receive shares of stock of Equity. An amended Plan and Agreement of Merger was made as of October 30, 1970, between Take Two and Subsidiary providing for the merger of Take Two into Subsidiary and the issuance to the shareholders of Take Two of shares of stock of Equity, but on revised terms. The Agreement and Plan of Reorganization, the amendment thereto, the Plan and Agreement of Merger, and the amended Plan and Agreement of Merger, together with the 1970 Escrow Agreement hereinafter referred to, constituted a single unified plan (hereinafter referred to as "the Plan") under which the stockholders of Take Two were to receive shares of stock of Equity, and Take Two was to become a wholly-owned subsidiary of Equity.

4. Defendants Jerome B. Kates, Judith Kates, Murray Berliner, Vito Doino and Lillian Collica are some of the former shareholders of Take Two who received shares of stock of Equity pursuant to the Plan.

5. Defendants Samuel Mallis and Jack J. Arnold are transferees of shares of Equity acquired by defendants Jerome B. Kates and Judith Kates pursuant to the Plan.

6. Defendant Franklin National Bank is a pledgee of stock of Equity issued to Jerome B. Kates and Judith Kates pursuant to the Plan.

7. All of the individual defendants reside outside of the State of Delaware and defendant Franklin National Bank is a New York corporation which does not do business and is not registered to do business in the State of Delaware. The addresses of all defendants are set forth in the Affidavit of Louis J. Finger attached hereto.

8. Under the Plan, each share of stock of Take Two was to be exchanged for .64815 shares of Common Stock of Equity, to be adjusted upward or downward pursuant to a formula related to earnings of Take Two for the calendar year 1970 (with further adjustments related to earnings of Take Two for the calendar years 1971, 1972, 1973 and 1974, and also with certain adjustments relating to the market price of the Common Stock of Equity during the month of December, 1971). The Plan provided that a percentage of the basic .64815 shares issued in exchange for each share of Take Two would be delivered to the stockholders of Take Two as "Conditional Shares", and the balance of the .64815 shares, plus sufficient shares to cover such additional amounts to which the stockholders of Take Two might become entitled pursuant to the Plan were to be deposited with National Bank of Georgia as Escrow Agent pursuant to an Escrow Agreement with Equity, the Subsidiary, and the stockholders of Take Two. The Escrow Agreement (hereinafter referred to as "the 1970 Escrow Agreement") was actually dated August 7, 1970, and amended October 30, 1970.

9. Pursuant to the Plan, those stockholders of Take Two who are named as defendants herein received the following number of conditional shares at the closing:

Jerome B. Kates	29,821
Judith Kates	10,563
Murray Berliner	493
Lillian Collica	23
Vito Doino	59

10. Pursuant to the Plan, each certificate evidencing the conditional shares received by the defendants bears a

legend to the effect that the conditional shares are subject to the provisions of the 1970 Escrow Agreement and may not be sold, transferred, pledged or hypothecated except in accordance with the provisions of the 1970 Escrow Agreement.

11. Because Take Two had no net earnings before taxes for the calendar year 1970, the shareholders of Take Two were not entitled under the Plan to any additional shares and were required, pursuant to the Plan, to return to Equity all the conditional shares issued to them.

12. The shareholders of Take Two other than those named as defendants herein, have all returned the conditional shares received by them to Equity, but the shareholders of Take Two named herein as defendants, have failed and refused to do so, although Equity has demanded the shares of them.

13. The interest of defendants Franklin National Bank, Samuel Mallis and Jack J. Arnold as transferees or pledgees was received with full notice of the terms of the Plan by reason of the legend inscribed upon those shares pursuant to 8 Del.C. § 202.

14. Because the stockholders were not entitled to the shares referred to in paragraph 9 herein, such shares should be cancelled and declared by this Court to be void.

15. Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff prays:

A. That the defendant be required to answer the Complaint, and that an Order be made pursuant to 10 Del.C. § 365 for the appearance of the defendants.

Exhibit D Annexed to Affidavit of Mallis and Kupferman.

B. That this Court declare the shares referred to in paragraph 9 of this Complaint to be cancelled and void.

C. That a restraining order and preliminary injunction issue pending the disposition of this action, restraining and enjoining each of the defendants from transferring, pledging or otherwise allowing any other person or entity to acquire rights in the shares referred to in paragraph 9 of this Complaint.

D. That defendants be permanently enjoined from transferring, pledging or otherwise allowing any other person or entity to acquire rights in the shares referred to in paragraph 9 of this Complaint and the defendants be required to surrender and deliver to the plaintiff the certificates evidencing such shares.

E. That plaintiff receive its costs and attorney's fees.

F. That the Court make such other orders for relief as are just in the premises.

LOUIS J. FINGER
LOUIS J. FINGER
Richards, Layton & Finger
4072 DuPont Building (Box 551)
Wilmington, Delaware 19899
Attorney for Plaintiff

Dated: May 16, 1974

Affidavit of Noel W. Hauser, in Support of Motion for Temporary Restraining Order.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF KINGS } ss.:

NOEL W. HAUSER, being duly sworn, deposes and says:

That in accordance with Rule 65 of the Federal Rules of Civil Procedure, I telephoned the defendants, Federal Deposit Insurance Corporation, European American Bank & Trust Company and Franklin National Bank, on February 24, 1975 to advise that I would forthwith be making application for a temporary restraining order restraining the negotiation of negotiable instruments and other evidences of debt and renewals thereof executed by plaintiffs in favor of said defendants.

I so advised Douglas Jones, Counsel for the defendant Federal Deposit Insurance Corporation and Mr. Jassy, general counsel to European American Bank & Trust Company between 11:30 and 11:45 A.M. on February 24, 1975. Upon telephoning the Franklin National Bank at three of its listed telephone numbers in the Manhattan phone directory, I was referred in one instance to the European American Bank & Trust Company, and in the two other instances, the telephone was not answered.

In conjunction with the plaintiff's application for a temporary restraining order, I am attaching hereto as an exhibit a letter dated March 3, 1972 from Jack J. Arnold, addressed to the plaintiff Samuel Mallis, confirming an agreement that Mallis was to advance the sum of $156,-

728.00 toward the purchase of 40,384 shares of Equity National Industries, Inc. This letter was apparently received by John Murfitt in the closing to which the affidavit of the plaintiffs, hereto annexed, refers.

The aforesaid letter was not referred to in the affidavit of the plaintiffs for the reason that in preparing the papers for signature and execution by plaintiffs, the letter was not available. However, I am advised by the plaintiffs that this letter was received by them as part of the closing documents.

No previous application for the relief herein requested has been made.

NOEL W. HAUSER

(Sworn to February 24, 1975.)

Exhibit Annexed to Affidavit of Noel W. Hauser.

LETTERHEAD OF JACK J. ARNOLD

March 3rd, 1972

Dr. Samuel Mallis
Roslyn, New York

Dear Dr. Mallis:

This letter is to confirm the agreement and understanding with Mr. John B. Fowler and myself as respects your participation in the purchase of 40,384 shares of Equity National Industries, Inc. You are to advance the sum of $156,728.00 towards the purchase price of $181,728.00, the sum of $25,000.00 already having been paid as a binder deposit on the purchase of the Eqity shares.

The shares are to be held as collateral by you. It is agreed that within thirty days or less you shall be reimbursed the funds advanced by you plus a profit of fifty (50,000.00) thousand dollars for your participation in this trade. Upon the remittance to you of your investment plus fifty thousand dollars you will deliver the shares to Jack J. Arnold free of any incumerances.

There is currently pending a transfer pursuant to a written option a block of 100,000 shares of Merck & Co., Inc. out of which proceeds you will be reimbursed for the total sum of money accruing to you. This transfer will be completed during March, 1972.

Very truly yours

Jack J. Arnold, as attorney
John B. Fowler

Answer of Defendant Bankers Trust Company.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

ANSWER

The defendant, Bankers Trust Company, by its attorney, Charles Leeds, answering the plaintiffs' Complaint herein, respectfully shows and alleges:

1. Denies each and every allegation in Paragraphs designated as "Twenty-first," "Twenty-second," "Twenty-third," "Twenty-fourth" and "Twenty-fifth."

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

2. The Complaint fails to state a cause of action against this defendant upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

3. Plaintiffs are collaterally estopped from bringing this action against the defendant, Bankers Trust Company, by reason of the fact that in a prior action in the Supreme Court of the State of New York, County of New York entitled "SAMUEL MALLIS v. JEROME B. KATES, JUDITH KATES, BANKERS TRUST COMPANY, et als"—Index No. 25831/1972, a Judgment was rendered in favor of this defendant and against the plaintiff, dismissing plaintiff's Complaint upon the merits, and the issues, if any, in the present case were or could have been litigated in the said prior Supreme Court action, and therefore should not be re-litigated herein.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

4. In a prior action instituted by the plaintiff, Samuel Mallis, against this defendant in the Supreme Court as hereinabove alleged in the Second Affirmative Defense, a Judgment dismissing plaintiff's Complaint upon the merits was rendered in favor of this defendant and against the plaintiff, Samuel Mallis. The said determination in the prior Supreme Court action is res judicata in this action and the plaintiffs are therefore bound by the said Supreme Court Judgment.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

5. The plaintiffs were and are total strangers to any dealings with and transactions had between the defendant, Bankers Trust Company, and Jerome and Judith Kates. The plaintiffs have no claim against this defendant since there never was any privity of contract or otherwise between these plaintiffs or either of them with respect to any transactions between the defendant, Bankers Trust Company, and the said Jerome and Judith Kates.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

6. There was no duty on the part of the defendant, Bankers Trust Company, to advise plaintiffs as to the validity of the subject shares of stock which plaintiffs purchased from Jerome and Judith Kates, since there was no relationship between plaintiffs and this defendant; any damage alleged to have been suffered by plaintiffs was brought about by their own negligence in their failure to investigate the subject shares of stock.

Answer of Defendant Bankers Trust Company.

WHEREFORE, defendant, Bankers Trust Company, demands Judgment dismissing the plaintiffs' Complaint herein, together with the costs and disbursements of this action.

Dated: New York, N.Y.
April 7, 1975

/s/ CHARLES LEEDS
CHARLES LEEDS, Esq.
Attorney for Defendant,
Bankers Trust Company
1775 Broadway
New York, New York 10019
MUrray Hill 2-5888/9

Affidavit of Nathan Silverman, Sworn to April 25, 1975.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

NATHAN SILVERMAN, being duly sworn, deposes and says:

That I am an Attorney at Law associated with Charles Leeds, the attorney for the Defendant, Bankers Trust Company.

That I submit this Affidavit at the direction of Judge Pollack to furnish Plaintiffs' Attorney with factual information in order to enable him to respond to the same on or before May 5, 1975.

The facts upon which the Defendant, Bankers Trust Company, relies for summary judgment dismissing Plaintiffs' complaint are set forth with particularity in an action instituted by Plaintiffs against this Defendant in the Supreme Court in the State of New York, County of New York under Index No. 25831/1972 and the papers, Affidavits, pleadings, etc., on file in said action are incorporated herein by reference.

.....
NATHAN SILVERMAN

(Sworn to April 25, 1975.)

Notice of Motion to Dismiss Cause of Action, Dated February 20, 1973.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SAMUEL MALLIS,

Plaintiff

—against—

JEROME B. KATES, JUDITH KATES, JACK J. ARNOLD, JOHN B. FOWLER, JR., EQUITY NATIONAL INDUSTRIES, INC., EQUITY-TAKE TWO, INC., THE NATIONAL BANK OF GEORGIA, BANKERS TRUST COMPANY and WILLIAM LONDON,

Defendants

Index No. 25831/72

IC PTS

NOTICE OF MOTION TO DISMISS CAUSE OF ACTION

SIR:

PLEASE TAKE NOTICE, that upon the annexed affidavits of Nathan Silverman and Jack Jasper, sworn to on the 12th day of January, 1973, and upon the Summons and Complaint heretofore served herein, a motion pursuant to CPLR 3211(a) (7) will be made at an IC Part 8 of this Court, before Mr. Justice Nadel, to be held at the Courthouse thereof, located at 60 Centre Street, City and State of New York, in Room 412, on the 7th day of March, 1973, at 10:00 A.M., for a Judgment dismissing the plaintiff's Complaint as against the defendant, Bankers Trust Company, on the ground that the said Complaint fails to state a cause of action as against the defendant, Bankers Trust Company, and for such other and further relief as may be just, proper and equitable.

Notice of Motion to Dismiss Cause of Action, Dated February 20, 1973.

PLEASE TAKE FURTHER NOTICE, that pursuant to Rule 2214 (b) CPLR, affidavits and Memorandum of Law, if any, to be used in answering this motion are required to be served on the undersigned at least five (5) days before the hearing.

Dated: New York, N.Y.
February 20, 1973

YOURS, ETC.,

CHARLES LEEDS
Attorney for Defendant,
Bankers Trust Company
1775 Broadway
New York, New York 10019
MUrray Hill 2-5888/9

To: RUBEN SCHWARTZ, Esq.
ABRAHAM EPSTEIN, Of Counsel
Attorney for Plaintiff
450 Seventh Avenue
New York, New York 10001

Affidavit of Jack Jasper in Support of Motion to Dismiss Cause of Action.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

JACK JASPER, being duly sworn, deposes and says:

That I am an Assistant Treasurer assigned to the Delancey Street branch of Bankers Trust Company (herein "Bankers").

That I am the loan officer who transacted business with the defendant, Jerome B. Kates (herein "Kates").

That in and about the month of August, 1970, Kates applied for a $50,000.00 loan. He offered as collateral, 40,384 shares of the stock of Equity National Industries, Inc. (herein "Equity"). The shares of stock which he offered were legended stock, and before your deponent would approve and accept the same as collateral, your deponent requested and did obtain from Kates an opinion letter dated August 25, 1970, from a reputable firm of New York attorneys concerning the conditions of the Escrow Agreement set forth in the legend appearing on the stock certificates. This firm of attorneys, and I will be pleased to submit their names if the Court should so desire, rendered an opinion that practically all of the conditions of the Escrow Agreement had been complied with and that the stock would become eligible for public sale without registration six (6) months after August 7, 1970.

Relying upon such opinion letter, I approved the loan and Bankers accepted the Equity stock as collateral for

repayment of the $50,000.00 loan made to Kates and his wife, Judith. I definitely considered the stock as valuable, otherwise, it would have been folly and a violation of my duties as a loan officer to make such a loan, collateralized by "worthless" stock. Thereafter, I was told by defendant Kates that the restrictions were no longer effective and that all of the conditions in the Escrow Agreement which appeared on the legended stock had been fully complied with. I therefore considered this collateral as valuable.

Inasmuch as Kates was reducing his indebtedness by monthly payments, having reduced the loan from $50,000.00 to $45,000.00, the Bank took no action to sell the collateral.

For plaintiff to allege that Bankers knew that the legended Equity stock was "worthless" is a gratuitous statement not borne out by the facts.

There was never any confidential or fiduciary relationship between plaintiff and Bankers. I am advised by counsel that there was no duty on the part of Bankers to speak, namely, to advise plaintiff or his representative as to the value of the stock even assuming, arguendo, we knew the value thereof. I am further advised by counsel for Bankers that the plaintiff's Complaint is vulnerable to attack for insufficiency in that there is no basis both in law and in fact, to assess liability against Bankers for "silent acquiescence."

I therefore join with our attorney on the motion to dismiss plaintiff's Complaint for failure to state facts sufficient to constitute a cause of action against Bankers.

/s/ JACK JASPER
Jack Jasper

(Sworn to January 12, 1973.)

Affidavit of Nathan Silverman in Support of Motion to Dismiss Cause of Action.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

NATHAN SILVERMAN, being duly sworn, deposes and says:

1. That I am an attorney at law associated with Charles Leeds, the attorney for the defendant, Bankers Trust Company (herein "Bankers"), and am fully familiar with the facts and circumstances herein.

2. I make this affidavit in support of a motion by defendant, Bankers to dismiss plaintiff's Complaint for failure to state facts sufficient to constitute a cause of action, on which motion, pursuant to CPLR 3211 subd.(c), a party may submit evidence that could properly be considered on a motion for summary judgment and the Court may treat the motion to dismiss as a motion for summary judgment. The Summons and Complaint were served on Bankers on December 11, 1972; no Answer has been interposed by Bankers. A copy of the Complaint is annexed hereto and marked as Exhibit "A".

3. Your deponent is the attorney for Bankers who attended the closing on March 3, 1972, referred to in the Complaint. The closing took place at our office at 750 Third Avenue, New York, N.Y. At this closing, the defendant, Jerome B. Kates (herein "Kates"), sold to plain-

tiff the shares of stock of Equity National Industries, Inc. (herein "Equity") which shares of stock were held as collateral by Bankers for the repayment of a loan made by Bankers to Kates and his wife.

4. The facts and circumstances surrounding this transaction are as follows:

5. Prior to March 3, 1972, deponent was informed by Jack Jasper, the officer of Bankers who serviced the Kates account and whose affidavit is annexed hereto, that Kates had a purchaser for the Equity stock which he had given to Bankers as collateral for Kates' loan. I told Mr. Jasper, the Bank officer, that he should forward the stock certificates to your deponent and we would make available to Kates the use of our office where he could bring his purchaser, and upon payment of the balance due on his loan, the stock certificates of Equity would be released and returned to Kates simultaneously with such payment.

6. On March 3, 1972, the following persons came to our office to close this matter: the defendant Kates, John B. Fowler, Jr., a stockbroker (sued herein), Jack J. Arnold (sued herein), the attorney representing the *purchaser*, plaintiff herein, and John A. Murfitt, an Assistant Vice President of Franklin National Bank where the purchaser had an account, and who was to provide the funds for such purchase. The said representative of Franklin National Bank brought with him official checks to pay for the purchase of the said stock. I might mention as stated above, that our office was offered as a facility to accommodate the parties involved. I did not know and I was never told the name of the purchaser, nor was I interested. Also, I did not know whether the stockbroker Fowler represented Kates or whether he represented the purchaser, and again, I was not interested. I merely stood on the "sidelines"

while the aforementioned persons finalized their deal. I do know that attorney Arnold requested an affidavit from Kates with respect to the legend which appeared on the stock certificates.

7. I annex hereto and mark as Exhibit "B" a photocopy of one of the stock certificates for 29,821 shares of stock of Equity issued to Kates (the other stock certificate for 10,563 shares of Equity was issued in the name of Judith Kates, wife of the defendant Kates, also sued herein). The Court can readily observe that the legend appearing on the reverse side of the said certificate is as big as life and certainly called for an inquiry with respect to the same, which was done by attorney Arnold, representing the purchaser.

8. After receipt by attorney Arnold of an affidavit concerning the legended stock in question, Mr. Murfitt of Franklin National Bank wrote out several official checks and delivered one check of $45,000.00 to our deponent in payment of the balance due Bankers on Kates' loan. I called the attention of Mr. Murfitt, that he Murfitt, drew the said check payable to Kates and Bankers, and I could not accept the same as Bankers was not a party to the transaction involved. He thereupon struck out the name of Bankers as co-payee, initialed such change, and delivered the same to Kates who endorsed it over to Bankers, whereupon I released and turned over to Kates the two (2) stock certificates of Equity evidencing 40,384 shares of Equity. I annex hereto and mark as Exhibit "C" a photocopy of the official check of Franklin National Bank which indicates that it was payable to Kates and the name of Bankers crossed out and initialed by Mr. Murfitt.

9. In this action, the gravamen of plaintiff's Complaint is that Bankers aided and abetted a conspiracy on the

part of Kates, Fowler, plaintiff's own attorney Arnold, as well as the other defendants sued herein, by *"silent acquiescence"* in that Bankers did not advise plaintiff's attorney that the legended Equity stock was "worthless." This is a very *ingenious* theory conjured up by the plaintiff in an endeavor to bring in a financial institution such as Bankers, and visit upon Bankers the sin of malpractice charged by plaintiff against his own attorney sued in this very action. Indeed, I am very much surprised that the plaintiff did not charge his own bank, Franklin National Bank, with misfeasance, malfeasance or what have you.

10. Your deponent will submit to the Court upon this motion, a Memorandum of Law which will convince this Court beyond a shadow of a doubt that there was no duty on the part of Bankers to "speak" and advise plaintiff's attorney that the legended Equity stock was "worthless," even if this were true, because there was *no confidential* or *fiduciary relationship* between Bankers and plaintiff. Although not germane to the issue of liability on the part of Bankers, there is no proof that Bankers knew that the Equity stock was "worthless." On the contrary, as will be seen from the annexed affidavit of Jack Jasper, the Equity stock was considered valuable when accepted as collateral, and continued to be so considered up to the time of the closing on March 3, 1972.

11. The Equity stock was selling on the American Stock Exchange on March 3, 1972, at $12.00 per share which computed on the basis of 40,384 shares, held by Bankers as collateral, amounted to $484,608.00. I can only speculate that if plaintiff paid $156,728.00 for 40,384 shares selling at $484,608.00 at the prevailing market on March 3, 1972, he felt that he was getting a terrific bargain, and must have been anxious to make the deal. If he was

defrauded, liability if any, lies at the doorstep of persons and parties other than Bankers. Plaintiff is not a "babe in the woods;" he is a sophisticated person, a dentist by profession as I am informed, and was represented by his own attorney Arnold, a practitioner of thirty-five (35) years standing at the Bar.

12. I respectfully submit that both in law and in fact, the plaintiff has failed to state facts sufficient to constitute a cause of action against Bankers, and I respectfully urge that plantiff's Complaint be dismissed with costs.

/s/ NATHAN SILVERMAN
NATHAN SILVERMAN

(Sworn to January 12, 1973.)

Complaint in State Court Action.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

[SAME TITLE]

COMPLAINT

Plaintiff, complaining of the defendants, by Ruben Schwartz, Esq. respectfully show to this Court and allege:

AS AND FOR A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS:

FIRST: That upon information and belief, at all of the times hereinafter mentioned, the defendant Equity National Industries, Inc. (hereinafter called "National"), was and still is a Delaware corporation.

SECOND: That upon information and belief, at all of the times hereinafter mentioned, Equity-Take Two, Inc. (hereinafter called "Take-Two"), was and still is a Georgia Corporation.

THIRD: That upon information and belief, at all of the times hereinafter mentioned, the defendant The National Bank of Georgia (hereinafter called "Escrowee") was and still is a National Banking Corporation organized and existing under and by virtue of the laws of the State of Georgia.

FOURTH: That upon information and belief, at all of the times hereinafter mentioned, the defendant Bankers Trust Company (hereinafter called "Bankers") was and still is

a Banking Corporation organized and existing under and by virtue of the laws of the State of New York.

FIFTH: That upon information and belief, at all of the times hereinafter mentioned, the defendant Jack J. Arnold (hereinafter called "Arnold") was and still is an attorney and counsellor at law duly licensed to practice his profession in the State of New York.

SIXTH: That upon information and belief, at all of the times hereinafter mentioned, the defendant William London (hereinafter called "London") was and still is an attorney and counsellor at law duly licensed to practice his profession in the State of New York.

SEVENTH: That at all of the times hereinafter mentioned, each of the defendants "Arnold" and "London" held themselves out as skillful and honorable practitioners of the law, experienced in the handling and closing of stock sale transactions and practicing in accordance with the canons of ethics adopted or promulgated by the Association of the Bar of the State of New York.

EIGHTH: That upon information and belief, at all of the times herein mentioned, the defendant John B. Fowler, Jr. (hereinafter called "Fowler") was an officer and employee of J.S. Love and Company, Inc., stockbrokers, and was a joint venturer with the defendant "Arnold".

NINTH: That at all of the times hereinafter mentioned, the defendants Jerome B. Kates and Judith Kates, (hereinafter collectively called "Kates") were the owners of record of 40,384 shares of stock of the defendant "National" represented by stock certificates bearing #U1828 and #U1833 of the par value of $1.00 each.

TENTH: That upon information and belief, at all of the times herein mentioned the aforesaid shares of stock so owned by the defendants "Kates" had been and still were the subject of a certain escrow agreement dated on or about the 7th day of August, 1970, by and between the defendant "Take-Two" and the "Escrowee".

ELEVENTH: That upon information and belief, on the 30th day of October, 1970, there was executed by and between the aforesaid defendants "National", "Take-Two", the "Escrowee" and one Stanley C. Lesser as Nominee, an amendment to the aforesaid escrow agreement, wherein and whereby, among other things, the aforesaid 40,384 shares of stock represented by Certificates #U1828 and #U1833 were to be held in escrow by the Escrowee, pending the occurrence of the certain conditions set forth and described in said escrow agreement and the amendment thereto, as well as the certain restrictions and limitations endorsed on the body of said stock certificates.

TWELFTH: That upon information and belief, at all of the times herein mentioned, the aforesaid shares of stock represented by Certificate #U1828 and #U1833 were never delivered to the custody and possession of the Escrowee or in breach of the terms and conditions of said escrow agreements and without authority were released from the possession of the Escrowee into the possession and control of the defendants "Kates".

THIRTEENTH: That upon information and belief, the aforesaid defendants "Kates" subsequently pledged and delivered the aforesaid certificates of stock bearing #U1828 and #U1833 to the defendant Bankers Trust Company, its agents, servants and employees as collateral, for a certain loan made by said defendant Bankers Trust Company to the defendants "Kates".

FOURTEENTH: That upon information and belief, at all of the times herein described and hereinafter mentioned, each of the aforesaid certificates of stock bearing #U1828 and #U1833 of the defendant Equity National Industries Inc. bore the following legend in bold type across the margin thereof:

"The shares evidenced by this certificate are subject to the provisions of an Escrow Agreement dated August 7, 1970 among the Corporation, Equity-Take Two, Inc., The National Bank of Georgia and Stanley C. Lesser, as nominee for the former shareholders of Take Two, Inc., and may not be sold, transferred, pledged or hypothecated except in accordance with such Escrow Agreement, a copy of which may be examined at the office of the Corporation."

FIFTEENTH: That upon information and belief, at all of the times herein mentioned, each of the defendants named herein, had notice and knowledge of the existence of the above quoted restrictions upon the sale, transfer or encumbrancing of such stock certificates bearing #U1828 and #1833, and were fully aware, or should have known, of the terms, conditions and provisions of the escrow agreement and amendment thereto.

SIXTEENTH: That upon information and belief, in or about the month of February, 1972, the defendants "Kates" entered into an unlawful agreement and conspiracy with the defendants "Arnold" and "Fowler", wherein and whereby, among other things, they conspired and agreed to cheat, swindle and defraud the plaintiff, Samuel Mallis, and in furtherance of said conspiracy and unlawful agreement and to effectuate the purpose thereof, did and performed the following overt acts:

(a) Falsely and fraudulently represented, that the certificates of stock bearing #U1828 and #1833 were free and

clear of any restrictions or encumbrances thereon, and had been released from the escrow described in the agreement and amendment thereto.

(b) Falsely and fraudulently represented to plaintiff, that the aforesaid shares of stock would fairly, reasonably and adequately serve as collateral for the return to plaintiff of the amount of their investment and the profit of $50,000. within 30 days of the purchase of said stock, and that upon default of such payments, plaintiff would have title to and own such stock free of any restrictions, liens or encumbrances.

(c) They further fraudulently and untruthfully represented to the plaintiff that there was currently pending, at the option of the defendants "Arnold" and "Fowler" a purchase by them of a block of 100,000 shares of Merck & Co. Inc. at an advantageous price, from the proceeds of the sale of which, the sums of money so invested by the plaintiff and profit would be further secured, collateralized and repaid.

(d) The defendants "Kates", "Arnold" and "Fowler" among others attended a closing on the 3rd day of March, 1972, at the premises of the Bankers Trust Company, 750 Third Avenue, New York City, New York, wherein and whereby the defendants "Kates" falsely and fraudulently represented that the shares of stock bearing #U1828 and #1833 to be transferred at such closing had previously been released from the escrow agreement and amendment thereto, and that said escrow agreement in no way restricted or encumbered the negotiability of the stock.

(e) Acting in concert with the other defendants, and as part of the aforesaid fraud and swindle, the defendant "Arnold" in his capacity as an attorney and counsellor at law, pretended to accept the aforesaid statements and rep-

resentations of the defendants "Kates" as true, although the defendants knew that the aforesaid statements were false and fraudulent and without any legal effect of any kind, nature or description.

SEVENTEENTH: That upon information and belief, at all of the times herein mentioned, and at the time of such closing, the defendant "Bankers", its agents, servants and employees were fully aware that the restrictions of the sale of said stock were in full force and effect, the escrow agreements fully binding and conclusive on the parties thereto, and that the defendants "Kates" had no legal right to sell, transfer or assign such stock certificates free and clear of encumbrances, but remained silent, and failed to disclose such knowledge to the plaintiff or his representatives.

EIGHTEENTH: That upon information and belief, the defendant "Bankers" aided and abetted the conspiracy and swindle, for the purpose of securing the repayment of its loan from the defendants "Kates" and for that reason assisted the conspirators in foisting off worthless collateral consisting of stock certificates #U1828 and #1833 upon the plaintiff by its silent acquiescence and participation in the closing which took place at its office, and its acceptance of the "investment" of plaintiff or a portion thereof in liquidation of its loan to "Kates".

NINETEENTH: That upon information and belief, the defendant "Escrowee" contributed to the aforesaid conspiracy and fraud by unlawfully, and without authority, and in breach of the escrow agreement and amendment thereto, first referred to, releasing from its possession and custody the aforesaid stock certificates #U1828 and #1833 representing the shares of stock which were the subject of the escrow, prior to the occurrence of the conditions

described therein, and delivering physical possession of such certificates with apparent power of hypothecation to the defendants "Kates".

TWENTIETH: That upon information and belief, the defendant "London" contributed to the aforesaid damage of the plaintiff and aided and abetted the aforesaid conspiracy and fraud, in that he had notice and knowledge acquired by him as an attorney at law associated with the former attorneys for the defendants "Kates", of the existence of the escrow agreements referred to above, their terms and conditions, and was fully aware of the restrictions, encumbrances and limitations of said stock, its sale or hypothecation on and before the 24th day of February, 1972.

TWENTY-FIRST: That despite such notice and knowledge, and aware of the restrictions on the sale or transfer of such stock, he acted as counsel to the defendants "Kates", in the negotiation, preparation and execution of the certain documents pertaining to the ostensible sale of such stock to the defendant "Arnold", wherein representations and warranties were made by the defendants "Kates" certifying the negotiabilty of said stock certificates, their lack of encumbrances and the sellers' good title thereto.

TWENTY-SECOND: That upon information and belief, he failed and neglected to disclose to the plaintiff, the information which he possessed, but remained silent when there was a duty upon him to speak.

TWENTY-THIRD: That upon information and belief, the defendants "National" and "Take-Two", their agents, servants and employees participated, joined, aided and abetted the aforesaid illegal scheme, conspiracy and fraud, in that having executed the escrow agreements, first re-

ferred to, thereby having imposed restrictions on the sale or transfer of such stock certificates, they permitted and allowed physical possession of the certificates to be and remain in the hands of the defendants "Kates", with ostensible and apparent authority to negotiate and hypothecate the same.

TWENTY-FOURTH: That each of the representations of the defendants above set forth were false, fraudulent and untrue, and were either known to be false when made or were made so recklessly and without heed to the consequences, as to constitute fraudulent statements.

TWENTY-FIFTH: Contrary to the aforesaid representations of the defendants, the stock was subject to the restrictions imposed by the escrow agreements; had not been released therefrom; nor was the stock negotiable, transferable or salable, free from encumbrance, restriction or limitation, nor did the defendants "Kates" or other defendants have good, marketable, unencumbered title thereto, free and clear of any liens.

TWENTY-SIXTH: That the plaintiff believed the representations of the defendants, relied on them, and would not have entered into the aforesaid transaction, had he been aware of the falsity thereof.

TWENTY-SEVENTH: That upon information and belief, each of the defendants entered into and participated in the aforesaid conspiracy and unlawful agreement to cheat, defraud and swindle the plaintiff and did and performed the overt acts above described for said purpose and in furtherance of the conspiracy.

TWENTY-EIGHTH: That by reason of the premises plaintiff, was deprived of the investment of $156,728, together

with the sum of $50,000 profit, making a total of $206,728, no part of which has been paid, except the sum of $50,000, leaving a balance due and owing in the sum of $156,728 with interest from the 3rd day of March, 1972.

AS AND FOR A SECOND CAUSE OF ACTION AGAINST THE DEFENDANTS JACK J. ARNOLD AND JOHN B. FOWLER, JR.

TWENTY-NINTH: Plaintiff repeats, reiterates and realleges each and every allegation contained in the first cause of action as paragraphs "FIRST" through "FOURTEENTH", inclusive, with the same force and effect as if more fully set forth at length herein.

THIRTIETH: That on or about the 3rd day of March, 1972, for good and valuable consideration, the defendants "Arnold" and "Fowler" entered into a contract with the plaintiff, wherein and whereby, among other things, they agreed to pay to the plaintiff the sum of $156,728, his investment, together with the sum of $50,000 profit, within 30 days of the date of such agreement, and further agreed to deliver to the plaintiff 40,384 shares of the stock of the defendant "National" without any restrictions or limitations on its sale and negotiation and having a market value of approximately $500,000 as security and collateral for such payments.

THIRTY-FIRST: That in breach of said contract, and in violation of the terms thereof, defendants "Arnold" and "Fowler" failed, neglected and refused to make such payments of investment and profit, and failed to deliver to plaintiff 40,384 shares of National stock as agreed, unrestricted and unlimited as to negotiability and transfer, but on the contrary delivered to the plaintiff stock certificates representing such shares, so restricted and so limited as to make them absolutely worthless.

THIRTY-SECOND: That by reason of the premises, plaintiff sustained damage in the sum of $206,728, no part of which has been paid except the sum of $50,000, leaving a balance due and owing to the plaintiff in the sum of $156,728 with interest from the 3rd day of March, 1972.

AS AND FOR A THIRD CAUSE OF ACTION AGAINST THE DEFENDANT, JACK J. ARNOLD.

THIRTY-THIRD: Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs of the complaint designated "FIRST" through "FOURTEENTH" inclusive with the same force and effect as if more fully set forth at length herein.

THIRTY-FOURTH: That the defendant "Arnold" was guilty of negligence and malpractice in that he failed to secure on behalf of the plaintiff unrestricted and unlimited stock; in that he failed to take the usual normal reasonable precautions to secure on behalf of the plaintiff, a valid title to unrestricted and unlimited stock having a value reasonably related to the sums of money it was intended to secure, but on the contrary accepted documents representations and papers from the defendant "Kates" wholly inadequate for such purpose; in that he failed to exercise reasonable skill in the practice of his profession or to take such precautions as would normally be taken by a practicing attorney in the City and State of New York to secure unrestricted and unlimited stock as collateral; that he recklessly and carelessly failed to heed the plain endorsement of the legend on the stock certificates which indicated that said stock was restricted and limited as to negotiability and transfer; that contrary to the canons of ethics promulgated and/or adopted by the Association of the Bar of the State of New York, the said defendant

while purporting to represent and act on behalf of the plaintiff, acted in his own and conflicting interest; and in that the said defendant was otherwise careless, reckless and negligent in the premises, all to the damage of the plaintiff in the sum of $156,728.

AS AND FOR A FOURTH CAUSE OF ACTION AGAINST THE DEFENDANTS JEROME B. KATES, JUDITH KATES AND WILLIAM LONDON.

THIRTY-FIFTH: Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs of the complaint designated "FIRST" through "FOURTEENTH" inclusive with the same force and effect as if more fully set forth at length herein.

THIRTY-SIXTH: That the defendants "Kates" and "London" knew and were well aware that the 40,384 shares of National stock transferred from the defendant "Kates" to the defendant "Arnold" by the purchase agreement of the 24th day of February, 1972 were restricted and limited as to their negotiability, transfer and sale.

THIRTY-SEVENTH: That the defendants and each of them were guilty of fraudulent concealment in failing to disclose such fact to the defendant "Arnold" and/or the plaintiff.

THIRTY-EIGHTH: That said fraudulent concealments was practiced by said defendants "Kates" for the express purpose of cheating and swindling the plaintiff herein, knowing full well that he would rely on the statements made to him that the stock was free from any limitations or restrictions on its negotiability or transfer, and defendant "London" aided and abetted defendant "Kates", by his silence and failure to speak.

THIRTY-NINTH: That by reason of the aforesaid fraudulent concealment plaintiff sustained damage in the sum of $156,728. plus interest from the 3rd day of March, 1972.

AS AND FOR A FIFTH CAUSE OF ACTION AGAINST ESCROWEE, NATIONAL AND TAKE-TWO.

FORTIETH: Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs of the complaint designated "FIRST" through FOURTEENTH" inclusive with the same force and effect as if more fully set forth at length herein.

FORTY-FIRST: That each of the defendants above described were negligent in that having executed between them an escrow agreement and amendment thereto, wherein and whereby the aforesaid 40,384 shares of "National" stock were to be held in escrow by the "Escrowee" pending the conditions for release described therein, they allowed and permitted the aforesaid stock certificates #U1828 and #U1833, representing the aforesaid 40,384 shares of "National" stock to leave the possession of the "Escrowee" and to be delivered instead to the possession of the defendants "Kates", placing him in a position to commit the fraud described in this complaint, and to fraudulently and unlawfully hypothecate, negotiate and transfer said stock, all to the damage of the plaintiff in the sum of $156,728.

FORTY-SECOND: That plaintiff was free from any negligence contributing to his aforesaid damage.

AS AND FOR A SIXTH CAUSE OF ACTION AGAINST THE DEFENDANT BANKERS TRUST COMPANY

FORTY-THIRD: Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs of the

complaint designated "FIRST" through "FOURTEENTH" inclusive, with the same force and effect as if more fully set forth herein at length.

FORTY-FOURTH: That the defendant "Bankers", anxious to receive from defendants "Kates" the repayment of its loan foisted off upon the plaintiff the worthless 40,384 shares of restricted "National" stock, which it had held as collateral from "Kates" to secure said loan, and wrongfully and fraudulently concealed from plaintiff and "Arnold" that the collateral was restricted and limited as to its negotiability, assignability and transfer, and was substantially worthless.

FORTY-FIFTH: That further practicing such fraudulent concealment, the defendant "Bankers" its agents, servants and employees at the closing of the transaction silently and without disclosure permitted and allowed the defendants "Kates" to deliver an affidavit to the defendant "Arnold", to the effect that the aforesaid stock certificates were free and clear of any restrictions or limitations on negotiability, transfer or assignment.

FORTY-SIXTH: That continuing to practice said fraudulent concealment the said defendant "Bankers" its agents, servants and employees made no effort to inform the defendant "Arnold" of the falsity of said statement of the defendants "Kates" but on the contrary aided, abetted him and consented to such deception by remaining silent, despite its prior knowledge and notice that the aforesaid representations of "Kates" were false and fraudulent and that the monies of the plaintiff were to be paid over in reliance thereon.

FORTY-SEVENTH: That in further pursuance of such fraudulent concealment, the defendant "Bankers" at such closing accepted the plaintiff's monies in liquidation and repayment of "Kates" loan from the defendant "Bankers",

although its officers and agents then were aware that such monies were being advanced against worthless stock of "National", all to the damage of the plaintiff in the sum of $156,728. with interest from the 3rd day of March, 1972.

WHEREFORE, plaintiff demands judgment against the defendants in the sum of $156,728. with interest from the 3rd day of March, 1972, together with the costs and disbursements of the within action.

RUBEN SCHWARTZ
ABRAHAM EPSTEIN, of counsel
Attorneys for Plaintiff
450 7th Avenue
New York 1, N.Y.

VERIFICATION.

STATE OF NEW YORK, COUNTY OF NEW YORK: ss.

SAMUEL MALLIS being duly sworn, deposes and says that he is the plaintiff in the within action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

SAMUEL MALLIS

Sworn to before me this
6 day of December, 1972.

BERNARD S. EPSTEIN
Notary Public State of New York
No. 31-6194075
Qualified in New York County
Commission Expires March 30, 1977

Affidavit of Abraham Epstein in Opposition to Motion to Dismiss Complaint.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ABRAHAM EPSTEIN, being duly sworn, deposes and says:

1. I am trial counsel for the plaintiff herein and make this affidavit in opposition to the motions of the defendants Bankers Trust Company, referred to in the complaint as "Bankers" and William London referred to as "London", to dismiss the complaint for insufficiency pursuant to CPLR 3211(a)(7).

2. The recitations as to the facts are made by me upon information and belief, the source of my information and the grounds of my belief being accounts of investigations conducted by the office of the attorney of record for plaintiff, which are in the file turned over to me, correspondence and interviews with the plaintiff, who resides in a County other than where I maintain my office.

3. Since plaintiff personally had no contact with the knowing defendants he would, of necessity, be compelled to rely on the documents described above, if he were to make this affidavit, and it is for that reason that same has been dispensed with and mine substituted.

THE INCEPTION OF THE SCHEME

4. The plaintiff is a practicing dentist, residing in the County of Nassau; that the defendant Jack J. Arnold was a practicing attorney in Manhattan and had been acting in such professional capacity for plaintiff, in an unrelated matter.

5. The defendant John B. Fowler, Jr. was also a client of defendant Arnold, was represented to be a stockbroker, an executive and agent of J. S. Love & Co.

6. Sometime prior to the 3rd day of March, 1972, defendant Arnold approached plaintiff with a plan whereby plaintiff could earn $50,000.00 for a short term investment of capital.

Briefly stated, plaintiff was to advance towards the purchase price of 40,384 shares of Equity National common stock from Kates, the sum of $156,728.00, $25,000.00 having been previously paid by Fowler and Arnold.

The shares were to be held as collateral by plaintiff for thirty days at which time he was to receive the amount of his "investment" plus the sum of $50,000.00 "profit".

The terms of this agreement were embodied in a letter prepared by Arnold, annexed as plaintiffs Exhibit 1.

At the same time, there was exhibited to plaintiff a certain purchase agreement between Kates and Jack Arnold "as attorney", dated February 24, 1972, which had been prepared by the defendant London as Kates' attorney, for the sale of the stock to Arnold. There was no mention made of the stock being escrowed or otherwise restricted. A copy is hereto annexed as plaintiff's Exhibit 2.

Simultaneously, as additional bait, there was exhibited to plaintiff's the so-called "Option Contract", plaintiff's Exhibit 3 annexed, purporting to give Jack Arnold "as attorney", an option to purchase 110,000 shares of Merck & Co. Inc. common stock from Kates at sixty per cent of the then existing market price, stock which it developed later, Kates had never even owned.

THE CLOSING

7. On March 3, 1972, a closing of the stock transaction was had at the offices of Bankers Trust Co. Plaintiff was not present at the closing, having been assured by Arnold that he could handle it alone. On behalf of Bankers Trust Company was present the bank officer, Jack Jasper, and the bank attorney, Nathan Silverman.

The reason for their presence was that Kates owed the Bank a balance of $45,000.00 of a $50,000.00 loan, which he had not paid when due, but was liquidating on a monthly basis. The loan was secured only by the shares of Equity National stock in question, which bore in bold print on their face a legend indicating their non-negotiability and that they were subject to an escrow agreement.

Arnold purported to act for the plaintiff as attorney. Kates was present alone, his attorney, London, having absented himself. The money was brought to the closing by a representative of Franklin National Bank, from whom it had been borrowed by plaintiff.

When the stock certificates were finally prooduced (plaintiff's Exhibits 4 and 5), Arnold took from Kates and Kates delivered to him, an affidavit (Exh. 6) brazenly swearing that the legend on the stock was meaningless, and that the stock was free from any encumbrance. Arnold's motives in accepting so flimsy a contrivance are highly questionable. He certainly could not have been acting in the interests of plaintiff. He had apparently decided that no obstacle to the closing of the deal should be interposed.

Plaintiff's $156,728.00 was divided up between Kates and Bankers Trust Company, who were thus "bailed out" of a loan collateralized by worthless stock and even less reliable debtor.

The bank with its investigative facilities certainly had notice and knowledge of the restrictions on the stock. The making of the loan itself, based on such flimsy collateral, was not good sound banking practice, let alone the character of the borrower.

For the bank to stand by while the fraudulent affidavit was prepared by Kates and accepted by Arnold, in the absence of the plaintiff advancing the money, was something far more significant than mere silence of a bystander.

The closing was in its office, under its auspices and the atmosphere was conducive to an aura of respectability and reliability.

Instead of crying out indignantly at the perpetration of the outrage, the bank elected to participate in the spoils thereof, and "bail out" of its bad loan.

8. The attorney, London, had been an associate of the law firm which had represented Kates, when Equity National acquired his stock in Equity-Take Two Inc., and had issued the escrowed stock in partial consideration thereof.

Despite the knowledge which he must have acquired in such capacity as to the nature of the restrictions thereon, in preparing the purchase agreement (plaintiff's Exhibit 2) on behalf of Kates, who was now his client, he pointedly omitted to mention therein any encumbrances or lack of them. Couple this fact with his significant absence from the closing, where he knew the question would arise, and more than a fair case is made out of "fraudulent concealment".

Such an inference is buttressed by the fact that he subsequently again acted as attorney for Kates when restitution of the sum of $50,000.00 was made on account.

9. The incredible claims of the defendants Bankers and London to the effect that they were not obliged to speak, and that they could with impunity stand by, and watch must surely be made with tongue in cheek. The circumstances whereby plaintiff was mulcted of a small fortune by the perjurious affidavit of Kates (Exhibit 6), condoned and accepted by the attorney "Arnold" purportedly acting on behalf of the absent plaintiff, constituted an outrageous windle. To argue that "Bankers" a banking institution licensed as such by the State of New York and that "London", a member of the Bar, had no duty to speak under those circumstances, is simply not a valid argument. Especially is this so, when defendants' first-hand knowledge of the brazen hoax that was being perpetrated is reflected upon. If there was no duty upon them to break their silence, there was at least a solemn obligation on their part not to participate in fraudulent concealment. By their acts and their silence, they created an impression of truth. They were guilty of more than mere forbearance to speak. Each of them in their own self interest, had a motive for the concealment practiced upon the plaintiff.

The complaint spells out a good and meritorious cause of action. Conspirators do not publicly announce their intent to defraud. In order to establish the allegations of the complaint, it is vital that disclosure proceedings take place, including examination before trial of each of the defendants and inspection of the documents and papers in their possession.

The plaintiff here who has been cheated out of a substantial sum of money is entitled to his day in Court in order to establish the merits of his action.

WHEREFORE, it is respectfully prayed that the within motions be denied in all respects.

ABRAHAM EPSTEIN

(Sworn to April 27, 1973.)

Option Contract Between Jerome B. Kates and Jack Arnold, Dated February 24, 1972.

OPTION CONTRACT

THIS AGREEMENT made this 24th day of February, 1972 between JEROME B. KATES, as custodian for Michael Harlan Kates of the first part, and JACK ARNOLD, as Attorney of the second part,

WITNESSETH:

That in consideration of $1.00 in hand paid by said second party to first party, the receipt of which is hereby acknowledged, said first party hereby bargains, sells and grants to second party the option and right for the term of one (1) month from date, to purchase from first party the following property:

110,000 shares of common stock of Merck & Co., Inc. at sixty (60%) percent of the then existing market price to be determined by computing the preceding five day average closing price.

The delivery of the Merck & Co., Inc. shares shall be validly and properly issued and good title with no encumbrances of any nature except for Securities and Exchange Commission rules or regulations.

WITNESS our hand and seals at New York, New York this 24th day of February, 1972.

JEROME B. KATES
as Custodian

Option Contract Between Jerome B. Kates and Jack Arnold, Dated February 24, 1972.

INDIVIDUAL ACKNOWLEDGMENT

STATE OF NEW YORK, COUNTY OF NEW YORK, SS.:

Before me the undersigned, a Notary Public, in and for said County and State, on this 24th day of February, 1972, personally appeared JEROME B. KATES to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand and seal the day and year last above written.

My commission expires March 30, 1972.

M. E. SILFEN
Notary Public

MARTIN ELLIOTT SILFEN

Affidavit of Jerome B. Kates, Sworn to March 3, 1972.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

JEROME B. KATES, being duly sworn, deposes and says:

That he is the owner of 29,821 shares of Equity National Industries, Inc. and that Judith Kates, his wife, is the owner of 10,563 shares of Equity National Industries, Inc., over which Jerome B. Kates has a written Power of Attorney to act.

On the back of each of these two (2) Certificates is a printed legend which reads as follows:

"The shares evidenced by this certificate are subject to the provisions of an Escrow Agreement dated August 7, 1970 among the Corporation, Equity-Take Two, Inc., The National Bank of Georgia and Stanley C. Lesser, as nominee for the former shareholders of Take Two, Inc., and may not be sold, transferred, pledged or hypothecated except in accordance with such Escrow Agreement, a copy of which may be examined at the office of the Corporation."

Deponent alleges that the legend on the back of each of these Certificates reflecting an Escrow Agreement, which is not present nor available to be attached to these Certificates, does in no way restrict the good transfer or negotiability of the shares.

That the particular shares involved have been released from the Escrow Agreement and will in no way encumber the negotiability of the same.

JEROME B. KATES
JEROME B. KATES

(Sworn to on March 3, 1972.)

Reply Affidavit of Nathan Silverman in Support of Motion to Dismiss Complaint.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

NATHAN SILVERMAN, being duly sworn, deposes and says:

That I am an attorney at law associated with Charles Leeds, the attorney for the defendant, Bankers Trust Company.

That I submit this affidavit in reply to the affidavit of Abraham Epstein, in opposition to the motion of the defendant, Bankers Trust Company, to dismiss the Complaint and for Summary Judgment.

In the first place, I cannot understand why Mr. Epstein submits his own affidavit instead of an affidavit by plaintiff. The Plaintiff resides in Nassau County; I see no reason for his failure to submit an affidavit. He was the person who negotiated the transactions in question. I can only suggest that the plaintiff, a sophisticated practicing dentist, is afraid to swear to an affidavit and tell the Court that all of the above named defendants duped and cheated him. Is this the naive innocent dentist who was represented by his attorney, Arnold, one of the above named defendants, who was interested in purchasing the Equity National Industries, Inc. stock at less than one-third (⅓) of the market value (Paragraph 11 of deponent's affidavit in support of this motion), and was also given an option to purchase Merck stock at 60% of its market value?

Mr. Epstein in Paragraph 7 of his affidavit, is very much mistaken in his statement that the Bank officer, Jack Jasper, was present at the closing. Your deponent was the only one present on behalf of Bankers Trust Company.

From a reading of the statements made by Mr. Epstein, it must be crystal clear to the Court that the plaintiff's grievance and quarrel is with his own attorney, the defendant Arnold, being sued for malpractice in this action. The opposing affidavit is replete with charges against the defendant Arnold.

In my Memorandum of Law submitted in support of the motion of the defendant, Bankers Trust Company, to dismiss the Complaint, I cited authority to the effect that since there was no confidential or fiduciary relationship between plaintiff and defendant, Bankers Trust Company, the Bank could not be liable for "silent acquiescence." Apparently, plaintiff's attorney, Epstein, realizes the weakness of his case and is now stressing "fraudulent concealment," and shying away from "silent acquiescence."

How can there be fraudulent concealment of legended stock which legend boldly appears on the stock certificates (plaintiff's own Exhibits 4 and 5)? How can there be fraudulent concealment when in truth and in fact, as plaintiff's own attorney states in his opposing affidavit that "Arnold took from Kates and Kates delivered to him an affidavit" (Exhibit 6 of his affidavit), concerning the restrictions of the legended stock. Again, plaintiff takes his own attorney to task.

At the bottom of Page 3 of the opposing affidavit, Mr. Epstein questions the wisdom of Bankers Trust Company in accepting as collateral security the Equity National stock to cover a loan made to defendant Kates. Who is plaintiff and his attorney to question the sound or unsound banking practice of an officer of Bankers Trust Company? Mr. Jasper, the Bank officer, is only answerable to his

superior and the Bank is answerable to the New York State Bank examiners. Be that as it may, Mr. Jasper stated in his affidavit in support of this motion, that he obtained an opinion from a reputable law firm concerning the restrictions and conditions attached to the Equity National Industries stock.

Mr. Epstein further deplores locale of the closing which took place at the office of counsel for Bankers Trust Company, and ascribes an ulterior motive to a closing in a dignified law office. Would Mr. Epstein have preferred that the closing took place in a "dark alley" so that he might have something to hang his hat on, namely, that it was so dark that the legend appearing on the stock certificates could not be seen by plaintiff's representatives? Your deponent makes this argument not facetiously, but as an indication of how far Mr. Epstein will stretch the rubber band to attempt to hold Bankers Trust Company in the case together with the seven (7) other defendants that plaintiff is suing.

In a desperate plea for denial of the motion of Bankers Trust Company to dismiss the Complaint, Mr. Epstein requests that disclosure proceedings take place. I am sure the Court will not heed such a plea because not one scintilla of evidence can be adduced, as is not already disclosed in the motion papers, and in the documentation submitted by both parties as Exhibits.

For the foregoing reasons, I again urge that the motion of the defendant, Bankers Trust Company to dismiss plaintiff's Complaint be in all respects granted.

NATHAN SILVERMAN
NATHAN SILVERMAN

(Sworn to on May 10, 1973.)

Opinion of Nadel, J., Dated July 13, 1972.

SUPREME COURT : NEW YORK COUNTY

[SAME TITLE]

NADEL, J.:

The three separate motions for dismissal of the complaint brought at various times by defendants, Equity National Industries, Bankers Trust Company and William London are consolidated for the purpose of this disposition.

Plaintiff, a dentist, entered into an arrangement with his own lawyer, defendant Arnold, whereby he advanced the sum of $156,728 for one month, and was to receive a "profit" of $50,000.00. As collateral for this loan, plaintiff was to hold 40,384 shares of Equity National Industries, Inc. There is absolutely nothing in the letter from defendant Arnold and defendant Fowler, whose status in this transaction is otherwise undefined, to indicate from whom the Equity shares would be obtained. Plaintiff received $50,000.00. He did not even attend the closing where his funds were transmitted by an officer of Franklin National Bank.

The Equity shares were restricted. The two stock certificates bore a legend to that effect on their face, and on the reverse side spelled out an Escrow Agreement held by the National Bank of Georgia. Arnold asked for and received an affidavit from defendant Kates to the effect that the restrictive legend had no force and effect. The shares were held by defendant Bankers Trust Company as collateral for a loan it had made to defendant Kates. The closing took place at Bankers Trust. Plaintiff thereafter found the stock to be without value and brought this action in conspiracy and fraud against all parties having any connection whatever with the shares or the transaction.

Defendant London, who was Kates' counsel, drafted an agreement between Kates and Arnold, and had no knowledge as to the existence of plaintiff. Moreover, he did not attend the closing. Plaintiff alleges he was guilty of silence when he had a duty to speak, which amounted to a "fraudulent concealment" because he knew of the Escrow Agreement and did not inform plaintiff.

Bankers Trust is likewise charged with the same duty to speak for the protection of plaintiff Equity National Industries, Inc., and is charged with both fraud and negligence in permitting "escrowed stock" into the possession of defendant Kates, thereby allegedly aiding and abetting in the swindle.

Plaintiff is proceeding under several fallacies with respect to facts. The Escrow Agreement sets up two classes of shares, conditional shares which were issued to the stockholders of the company being acquired subject to recall if certain profits were not realized, and final shares, which were held by the escrow agent until the number of final shares to be exchanged for conditional shares could be determined. The conditional shares had a restrictive legend placed on both face and back of each certificate. The restriction did not per se make the stock "worthless" as plaintiff contends. Equity National did not allow "escrowed shares" to circulate. These were final shares under the terms of the Escrow Agreement, which plaintiff could have determined from the National Bank of Georgia, the escrow agent, as well as transfer agent, if he had taken the precaution of examining the stock certificates.

The leading case on where there is a duty to speak is *Amend* v. *Hurley*, 293 N.Y. 587, which holds that barring a fiduciary or confidential relationship there is no duty to speak. Plaintiff had absolutely *no* relationship with de-

fendants London, Bankers Trust or Equity National. He was not even a purchaser of the shares, according to his letter arrangement with Arnold. No matter what he chooses to call his participation in this "investment", the Equity shares are called "collateral" and he is guaranteed *repayment* out of another stock transaction.

The "fraudulent concealment" he alleges against these defendants must fall on the basis of plaintiff's own exhibits in opposition to these motions. The legend showing a restriction on the sale or hypothecation of the shares appears on the face and back of both stock certificates. The court is unable to determine when or how plaintiff could or should have been informed by these defendants, who could not and did not know of his existence prior to the closing which he did not attend.

The motions to dismiss by these three defendants are granted. Settle orders.

s/ J. NADEL
J.S.C.

Dated: July 13, 1972

Order of Dismissal Entered August 1, 1973 by Nadel, J.

At an I.C. Trial Part 8 of the Supreme Court of the State of New York, held in and for the County of New York at the Courthouse located at 60 Centre Street, in the Borough of Manhattan, City of New York, on the 1 day of August, 1973.

Present: HON. BERNARD NADEL, Justice.

[SAME TITLE]

ORDER DISMISSING CAUSE OF ACTION

The defendant, Bankers Trust Company, by its attorneys, Charles Leeds, having duly moved for a Judgment pursuant to CPLR 3211(a) (7) dismissing the Complaint in the above entitled action, upon the ground that the Complaint fails to state a cause of action, and said motion having regularly come on to be heard,

Now, upon reading and filing the notice of motion dated February 20, 1973, the affidavit of Nathan Silverman sworn to January 12, 1973, the affidavit of Jack Jasper sworn to January 12, 1973 with the exhibits attached thereto, the reply affidavit of Nathan Silverman sworn to May 10, 1973, in support of the motion, the Summons and Complaint heretofore served herein, and upon the affidavit of Abraham Epstein sworn to April 27, 1973, in opposition thereto, and after hearing Nathan Silverman, Esq., of counsel for the defendant, Bankers Trust Company in support of said motion, and Abraham Epstein, Esq., of counsel for the plaintiff, in opposition thereto, and after due deliberation having been held thereon, and upon filing the opinion of the Court,

Order of Dismissal Entered August 1, 1973 by Nadel, J.

Now, upon motion of Charles Leeds, Esq., attorney for the defendant, Bankers Trust Company, it is

ORDERED, that the motion be and the same is hereby in all respects granted, and that Judgment be entered herein dismissing the Complaint in the above entitled action, as against the defendant, Bankers Trust Company, with costs as taxed by the Clerk of this Court and that the action against Bankers Trust Company be severed.

Enter,

s/ B N
J.S.C.

FILED

August 1, 1973

New York
County Clerks Office

Letter of Noel Hauser to Judge Pollack with Enclosures, Dated May 6, 1975.

LETTERHEAD OF HAUSER & ROSENBAUM, P.C.

May 6, 1975

Honorable Milton Pollack,
United States District Judge
United States Courthouse
Foley Square
New York, New York

Re: Mallis v. Federal Deposit Ins. Co., et al.
75 Civ. 909

Honorable Sir:

Yesterday we submitted to the Court a Memorandum of Law demonstrating the viability of the claims of the plaintiffs against each of the defendants. At Page 16 of that Memorandum, reference is made to a conversation had between the undersigned and an attorney who represented Equity National Industries prior to March 2, 1972, when plaintiffs became interested in the acquisition of stock, which is the subject of this action.

I have today received from that attorney, E. Cooke Rand, copies of documents and correspondence between Bankers Trust Company and the issuer, Equity National Industries, Inc., which are herewith enclosed. These documents are self-explanatory. In addition, I understand that Equity National Industries commenced an action in this Court against Jerome Kates and Bankers Trust Company under Docket No. 72 Civ.503, seeking cancellation of the securities. That action was abandoned in favor of a subsequently commenced action in the Delaware Courts.

Letter of Noel Hauser to Judge Pollack with Enclosures, Dated May 6, 1975.

Copies of this letter and enclosures are being forwarded to counsel for all parties.

Respectfully yours,

Noel W. Hauser

NWH:SL
cc: Hughes Hubbard & Reed, Esqs.
1 Wall St., New York, N.Y.
Charles Leeds, Esq.
1775 Broadway, New York, N.Y.

Sullivan & Cromwell, Esqs.
48 Wall St., New York, N.Y.

Letter of Noel Hauser to Judge Pollack with Enclosures, Dated May 6, 1975.

[EMBLEM] EQUITY NATIONAL INDUSTRIES

March 1, 1971

Bankers Trust Company
85 Delancey Street
New York, New York 10002

Attention Mr. Jasper

Re: Take Two, Inc.

Gentlemen:

This is to advise you that Take Two, Inc. ("Take Two") had no "net before tax earnings" for the calendar year 1970 and, accordingly, all shares of the common stock of Equity National Industries, Inc. ("Equity") issued to the former shareholders of Take Two are to be returned to Equity pursuant to the provisions of the Plan and Agreement of Merger between Take Two and the subsidiary of Equity into which Take Two was merged and the Escrow Agreement relating thereto. The certificates evidencing these shares bear a legend to the effect that they are subject to the provisions of this Escrow Agreement.

You are hereby requested to deliver to Equity at the address shown hereon all certificates for shares of common stock of Equity issued to Jerome B. Kates or Judith Kates in connection with the above merger of which you now have possession.

Should you have any questions, kindly contact the undersigned or our attorney, G. William Speer, at Powell, Goldstein, Frazer & Murphy, 1100 The Citizens and Southern National Bank Bldg., Atlanta, Georgia.

Very truly yours,

EQUITY NATIONAL INDUSTRIES, INC.

By: Arwin W. Strehlow, Vice President

Letter of Noel Hauser to Judge Pollack with Enclosures, Dated May 6, 1975.

March 4, 1971

Bankers Trust Company
85 Delancey Street
New York, New York 10002

Attention Mr. Jasper

Gentlemen:

In accordance with your request, enclosed herewith are copies of the following documents which bear upon the shares of common stock of Equity National Industries, Inc. given to you by Jerome B. Kates and Judith Kates to secure a loan or loans made by you to Mr. Kates.

1. Plan and Agreement of Merger between Equity-Take Two, Inc., a Georgia corporation and wholly-owned subsidiary of Equity National Industries, Inc., and Take Two, Inc., a New York corporation;

2. Escrow Agreement among Equity National Industries, Inc., Equity-Take Two, Inc., Stanley C. Lesser and The National Bank of Georgia; and

3. An amendment to the aforesaid Escrow Agreement.

We hereby renew our request on behalf of our client, Equity National Industries, Inc., that you return the above-mentioned shares. You will note from the enclosed documents that they were conditionally delivered to Mr. and Mrs. Kates as former shareholders of Take Two, Inc. and that they are no longer entitled to them.

Very truly yours,

G. William Speer
For Powell, Goldstein, Frazer & Murphy

GWS:cbi
Enclosures
cc: Mr. Arwin W. Strehlow

Letter of Noel Hauser to Judge Pollack with Enclosures, Dated May 6, 1975.

Letterhead of
Powell, Goldstein, Frazer & Murphy
Attorneys
Atlanta, Georgia 30303

April 14, 1971

Certified—Return
Receipt Requested

Bankers Trust Company
85 Delancey Street
New York, New York 10002

Attention: Mr. Jasper

Re: Take Two, Inc. and
Jerome and Judith Kates

Gentlemen:

By letter dated March 1, 1971, our client, Equity National Industries, Inc., requested that you deliver to Equity all certificates for shares of common stock of Equity issued to Jerome B. Kates or Judith Kates in connection with the merger of Take Two, Inc., a New York corporation, with Take Two, Inc., a Georgia corporation, a subsidiary of Equity. On March 2, 1971, my partner, William Speer and I met with your Mr. Masper to discuss the Take Two—Kates matter. We delivered to him at that time the March 1, 1971 letter referred to above.

At the request of your Mr. Jasper, we forwarded under cover letter of March 4, 1971, the documents which reflect the right of Equity to receive back the shares of stock issued to Mr. or Mrs. Kates.

We understood from our conversation with your Mr. Jasper that we would have some prompt indication

Letter of Noel Hauser to Judge Pollack with Enclosures, Dated May 6, 1975.

whether you would be willing to voluntarily deliver these certificates to our client. We have had no response to either of the two letters referred to.

We hereby demand immediate delivery to us or our client of Equity National Industries, Inc. Stock Certificates Nos. U1828 and U1833.

Please let us know if you intend to burden our client with the trouble and expense of filing legal action against the bank to obtain these certificates.

Thank you very much.

Yours truly,

Larry I. Bogart

LIB/h

cc: Managing Officer
Bankers Trust Company
85 Delancey Street
New York, New York 10002

Mr. Arwin Strehlow
Equity National Industries, Inc.
2700 National Bank of Georgia Building
Atlanta, Georgia 30303

Letter of Noel Hauser to Judge Pollack with Enclosures, Dated May 6, 1975.

[EMBLEM] BANKERS TRUST COMPANY
85 Delancey Street, New York, N. Y. 10002

JACK JASPER, Assistant Treasurer
Telephone 212 692-6863

April 20, 1971

Mr. Larry I. Bogart
Powell, Goldstein, Frazer & Murphy, Attorneys
Eleventh Floor
The Citizens & Southern National Bank Bldg.
Atlanta, Georgia 30303

RE: TAKE TWO, INC. AND
JEROME AND JUDITH KATES

Dear Mr. Bogart:

This is with reference to your letter of April 14th. Please be advised that we have made several appointments with Mr. Jerome B. Kates to meet with our Counsel and he has failed to keep such appointments. Our Attorneys are reviewing the papers in the files to the end that an opinion will be rendered as to the position of the bank with respect to the relationship of stock requested by you.

We ask your indulgence for a short time for proper evaluation to be made, at which time we will contact you and respond to your demand.

Very truly yours,

J. JASPER

JJ:IG

Letter of Noel Hauser to Judge Pollack with Enclosures, Dated May 6, 1975.

April 26, 1971

Mr. Jack Jasper
Assistant Treasurer
Bankers Trust Company
85 Delancey Street
New York, New York 10002

Re: Take Two, Inc. and
Jerome and Judith Kates

Dear Mr. Jasper:

Thank you for your letter of April 20th.

We would, of course, be happy to extend to the bank additional time for evaluation of your position by your attorneys.

Yours truly,

Larry I. Bogart

LIB/h

cc: Mr. Arwin Strehlow

Affidavit of Nathan Silverman, Sworn to May 12, 1975.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAMUEL MALLIS and FRANKLYN KUPFERMAN,
Plaintiffs,

—against—

FEDERAL DEPOSIT INSURANCE CORPORATION, EUROPEAN AMERICAN BANK & TRUST COMPANY, FRANKLIN NATIONAL BANK and BANKERS TRUST COMPANY,
Defendants.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

NATHAN SILVERMAN, being duly sworn, deposes and says:

That I am an Attorney at Law associated with Charles Leeds, the Attorney for the Defendant, Bankers Trust Company.

That I am fully familiar with the facts and proceedings had and taken herein and all the proceedings in the State Supreme Court wherein Plaintiff, Mallis, in this action sued the Defendant, Bankers Trust Company.

That I submit this Affidavit in answer to the Plaintiff's Memorandum of Law.

While Judge Pollack directed Plaintiff's counsel to file a memorandum showing the alleged liability of each of the Defendants, the memorandum submitted is replete with statements of fact made by counsel of which he has no personal knowledge, based upon hearsay, speculation and wishful thinking. Apparently, counsel is using the vehicle of a Memorandum of Law to buttress an otherwise spurious claim against Bankers Trust Company; I cannot let this

tactic go unchallenged. I am sure that the Court will admonish Plaintiff's counsel with respect to his conduct in so doing.

To demonstrate the untruthfulness and misstatements made by Plaintiff's counsel, let me point out the facts to the Court, inter alia, the following:

1. On Page 3, counsel states that Kates pledged with Bankers Trust the securities involved for a loan of approximately $40,000.00. The truth of the matter is that the loan was made in 1970 for the sum of $50,000.00

2. On Page 9, Plaintiff's counsel would have the Court believe that Bankers Trust accepted the subject securities from Kates as collateral for the payment on a Judgment of $54,795.25 entered against Kates on July 20, 1971. The truth of the matter is that the securities pledged with Bankers Trust were pledged by Kates in August 1970 when the original loans were made to him. The Judgment entered as aforesaid against Kates was based on a Confession of Judgment which Kates and his wife signed and a "work out" arrangement was made with them to give them an opportunity to liquidate their indebtedness, and at the same time secure the Bank by a lien on their residence property which had substantial equity. Plaintiff's counsel is brazen enough to tell Bankers Trust how to conduct its business when he now inquires as to why the securities were not sold to satisfy the Judgment.

3. At the bottom of Page 14 of his memorandum, Plaintiff's counsel states that Bankers Trust Company transferred the securities in question. Nothing is further from the truth. The truth of the matter is, and this cannot be questioned, when Bankers Trust received payment from Kates when the securities were sold by him to Dr. Mallis, Bankers Trust merely returned to Kates the pledged securities. This was the usual simultaneous transaction

as this Court can readily observe. No *transfer* was ever made by Bankers Trust Company. The Court's attention is directed to a check of Franklin National Bank dated March 3, 1972 in the sum of $45,000.00 payable to the order of Jerome B. Kates, which check is one of the checks submitted by Plaintiff as Exhibit B with his Memorandum of Law. This check was originally drawn by Mr. Murfitt of the Franklin National Bank to the order of Jerome B. Kates and Bankers Trust Company. I pointed out to Mr. Murfitt that Bankers Trust Company was not involved in any dealings between Kates and Franklin's customer, Dr. Mallis, and accordingly, I insisted that Bankers Trust Company as co-payee be stricken which was done and initialled by Mr. Murfitt, as this Court can readily observe; a copy of the said check is sub-joined.

773584

FRANKLIN NATIONAL BANK

DATE March 3rd 1972

$45,000 AND 00 CTS

TO THE ORDER OF Jerome B. Kates
J.M.
~~and~~
~~Bankers Trust Company~~

NON-NEGOTIABLE
JOHN MURFITT
AUTHORIZED SIGNATURE

||00773548|| |:0210|||0148|: 401|||00000 5||

The position of Bankers Trust Company is demonstrated in its answer and the defenses asserted in this action, and bears repetition:

A. Dr. Mallis, one of the Plaintiffs herein, brought suit in the State Supreme Court. The gravamen of his com-

plaint against Bankers Trust was that Bankers Trust was guilty of "silent acquiescence" in sitting by and allowing Kates to sell the securities to Mallis, knowing that the same were worthless. The State Court, on Bankers Trust's motion for Summary Judgment, dismissed Plaintiff's complaint against Bankers Trust *on the merits.* All of the papers and exhibits used on said motion are annexed hereto and marked as a single Exhibit, and made part hereof. Dr. Mallis, having lost in the State Supreme Court on the theory of "silent acquiescence", is now urging active participation on the part of Bankers Trust. There is only one conclusion to be drawn, namely, Mallis is "hoist on his own petard".

While Mallis in the State Court action sued everybody including his Attorney, Arnold (for malpractice), he failed to sue Franklin National Bank and its bank officer, Murfitt, against whom Plaintiff now asserts all kinds of misconduct. His failure to proceed against Franklin in the State Supreme Court raises serious questions as to the bone fides of his present claim against Franklin. However, this is a matter for Franklin to raise, but your deponent merely mentions it to show the reaching out and callousness on the part of Plaintiff.

B. Having been non-suited in the State Court, Plaintiff is now attempting to re-litigate issues that could have been litigated in the State Court. The cases are legion that Plaintiff is collaterally estopped, and the determination in the State Supreme Court is res judicata in this action.

See the following cases:

Commercial Bank vs. *Employer Ins. of Wausau,* 293 N.Y.S.2d 403; 57 Misc.2d 510, and
Federation vs. *Jarvis and Spitz, Inc.,* 230 N.Y.S. 2d 517; 35 Misc.2d 414.

Dr. Mallis has had his day in Court.

C. Plaintiff Mallis was a total stranger to Bankers Trust Company with respect to any transactions that he had with Kates; there was no privity of contract, no fiduciary or confidential relationship between Mallis and Bankers Trust, and therefore, Regulation "U" or any other regulations do not affect Bankers Trust Company insofar as Dr. Mallis is concerned. I might say that if Bankers Trust saw fit to accept from Kates as collateral, worthless securities for the repayment of loans made him in 1970, that was the concern of Bankers Trust Company and Dr. Mallis cannot latch on to violations, if any, on the part of Bankers Trust in accepting such securities from its customer, Kates.

On Page 16 of his brief, Plaintiff's counsel claims that he has been informed by an Attorney, whose name he does not mention, that Bankers Trust had notice prior to March 2, 1972 that Kates' securities were void. We have received a copy of a letter dated May 6, 1975 addressed to the Court by Plaintiff's counsel, enclosing copies of correspondence had between Equity National Industries, its Atlanta, Georgia Attorneys and Bankers Trust Company. These documents indicate a unilateral claim by the issuer, Equity National Industries, for the surrender by Bankers Trust to them of the securities held by Bankers Trust as collateral for loan made to Kates. Suffice it to say that Bankers Trust rejected such demand because the only person to whom Bankers Trust was obligated to return the stock was to its customer, Kates, upon payment of his outstanding indebtedness. The action by Equity against Bankers Trust instituted in this Court under the Docket No. 72 Civil 503 was abandoned and discontinued and no further action was ever taken by Equity National against Bankers Trust, from all of which the conclusion can be drawn that Equity was convinced that it had no cause of action against Bankers Trust. In any event, I do not see how this matter is germane to the issues in this case and counsel is merely cluttering up the record.

Affidavit of Nathan Silverman, Sworn to May 12, 1975.

At the top of Page 8 of his memorandum, Plaintiff's counsel, Mr. Hauser, states:

> "that it is believed that Silverman, in behalf of the Bankers Trust Company, orally assured Arnold that the certificates in question were no longer subject to an Escrow Agreement."

I vehemently deny that I gave such oral assurance to Arnold and resent the introduction of this accusation without supporting evidence. Again counsel is indulging in speculation and conjecture. If such an assurance or representation were made, then why did Dr. Mallis charge Bankers Trust Company with *"silent* acquiescence." As the filed papers in the State Supreme Court action will disclose, the offices of the Legal Department of Bankers Trust Company were used merely as a convenience to all parties for the closing and your deponent, as counsel for Bankers Trust Company sat silently by on the sidelines waiting for Kates and Arnold (Dr. Mallis' attorney) to conclude their negotiations and upon receipt by official check of Franklin National Bank of the sum of $45,000.00, the securities held by Bankers Trust Company were thereupon returned to Kates, who in turn delivered them to Arnold and Franklin National Bank for the account of Dr. Mallis.

The Court's attention is directed to the fact that the complaint herein is not verified, Plaintiff's memorandum is not verified and what counsel for Plaintiff seeks to do is to assert loose accusations, not supported by facts in an endeavor to conjure up some sort of cause of action in order to harass Bankers Trust Company. I feel confident that the Court will put an end to this harassment by dismissing Plaintiff's complaint against Bankers Trust Company. Plaintiff's request to re-plead should be denied as utterly lacking in merit.

/s/ Nathan Silverman

(Sworn to May 12, 1975.)

Affidavit of Samuel Mallis and Franklyn Kupferman, Sworn to May 14, 1975.

UNITED STATES DISTRICT COURT
Southern District of New York

[SAME TITLE]

State of New York }
County of Kings } ss.:

Samuel Mallis and Franklyn Kupferman, both being duly sworn, depose and say:

We are the plaintiffs in the within action. We submit this affidavit in opposition to the motion of European American Bank & Trust Company for dismissal of the Complaint herein.

We are both dentists practicing in Long Island. In approximately February of 1972, deponent Mallis had a conversation with one Jack Arnold, an attorney in the City of New York. Arnold told Mallis that he, in behalf of a client, one Fowler, an officer of J. S. Love & Co., a stock brokerage firm, had made a deposit toward the purchase of approximately 40,000 shares of the stock of Equity National Industries, Inc. Arnold told Mallis that the securities were unregistered, but that they would become marketable within a short period of time thereafter by reason of the promulgation of a new Rule promulgated by the Securities and Exchange Commission. Arnold told Mallis that the entire purchase price for the 40,000 shares was approximately $181,000.00 and that approximately $156,000.00 was urgently required to complete the purchase in default of which the deposit money would be forefeited and the benefit of the bargain would be lost. Arnold inquired of Mallis as to whether he or anybody in his circle

was in a position to provide the necessary funds to complete the transaction and offered an incentive a profit of $50,000.00 therefor. Arnold was able to justify the $50,000.00 increment because the market value on the American Stock Exchange of the stock of the issuer was between $10.00 and $13.00 per share, and the sale of the securities would produce funds at the then current price of at least $400,000.00.

Mallis had no such funds available. However, since Arnold had been representing Mallis in an unrelated transaction, Mallis agreed to make inquiries among his circle of friends and acquaintances to see whether the funds could be raised. Amongst others, Mallis called the plaintiff Kupferman, his brother-in-law. The funds could not be raised privately and accordingly Kupferman called John Murfitt, then an officer at the Franklin National Bank, for the purpose of inquiring as to whether the bank would be interested in participating in this transaction. Deponents at that time had no thought whatever of themselves becoming involved as principals.

Murfitt promptly returned Kupferman's communication to advise that he had checked out the transaction; that it appeared to be fair and regular; and that it represented a business opportunity which, however, the bank would not be willing to directly participate in, but would willingly advance all of the funds necessary to us in order that the transaction might be consummated.

The following day, March 3, 1972, we attended at the office of the Franklin National Bank, Uniondale Branch, prior to its official opening, as directed by Murfitt. We there signed documents which had been prepared by Murfitt. We were not requested to provide any collateral, nor did we in fact provide any collateral. Following execution of the documents, Murfitt advised us that it would be unnecessary for us to attend the closing scheduled for later that day because he himself would attend in our stead and disburse the bank funds. We thereupon left the bank and went to our respective offices.

In the latter part of the afternoon of the same day, Murfitt delivered the securities to the office of deponent Kupferman and stated that with the exception of the production of the Escrow Agreement to which the securities referred on their face, the transaction had been completed quite regularly.

Deponents first became concerned when we received the Escrow Agreement to which the certificates referred on their face. We then understood that the certificates had not been regularly issued in the first instance. We thereafter were in communication with various law enforcement agencies, but all to no avail.

We had been advised prior to the closing that the securities in question were in the hands of Bankers Trust Company. On the morning of the closing, Murfitt advised us that the securities were held by Bankers Trust Company as collateral for a loan to Jerome and Judith Kates, who were the owners thereof. At least one of the checks was to be drawn payable to the joint order of Jerome Kates and Bankers Trust Company. We subsequently learned that without our authority, the designation of Bankers Trust Company as a co-payee on that check had been stricken out at the time of closing.

We also subsequently learned that Bankers Trust Company had been placed upon direct notice by the issuer of the securities that the securities had not been regularly issued, but rather conditionally issued, and that they could not and should not be sold, transferred or hypothecated because they were worthless in that the conditions pursuant to which they had been issued had not been met. We

Affidavit of Samuel Mallis and Franklyn Kupferman, Sworn to May 14, 1975,

were also advised that at the very time of the closing, Kates and Bankers Trust Company had both been named as Parties-Defendants in an action pending in this Court under Index No. 72 Civ.503, and that the securities in question, amongst others of a similar issue, were the subject matter in issue.

We would not have become interested in this transaction if other securities of the issuer were not regularly being traded on the American Stock Exchange and if the then current price of the securities when regularly traded were not at least several times the amount of money which we had generated for use in consummating the transaction.

We are informed by our attorneys and believe that we have a good and meritorious cause of action (a) against the defendants Federal Deposit Insurance Corporation and European American Bank, as well as Franklin National Bank for cancellation and rescission of any obligations claimed by them to be owing by us, and (b) against Bankers Trust Company which withheld vitally material information from us and our representatives and, as we are informed, actually misrepresented that the securities in question were genuine when in fact they were not. We, therefore, respectfully pray that the motion for an order of dismissal be denied.

s/ Samuel Mallis

s/ Franklyn Kupferman

(Sworn to on May 14, 1975.)

Letter of Noel Hauser to Judge Pollack with Attachments, Dated May 15, 1975.

Letterhead of Hauser & Rosenbaum, P.C.

May 15, 1975

Honorable Milton Pollack,
United States District Judge
United States Courthouse
Foley Square
New York, New York

Re: Mallis, et al. v. Franklin National Bank, et al.
75 Civ. 909

Honorable Sir:

At a conference with the Court, the undersigned as the attorneys for plaintiffs, were directed to submit a memorandum demonstrating the viability of the claims of the plaintiffs against each of the defendants herein. We submitted such a memorandum which concededly did contain certain factual statements which were intended to comply with the Court's direction to submit a memorandum demonstrating the viability of the claims of the plaintiffs against each of the defendants.

Yesterday, we submitted an affidavit of the plaintiffs in opposition to the motion of the defendant European-American Bank to dismiss the Complaint, which motion was adjourned to May 16th, but which motion we understand has now been indefinitely postponed pending consideration by the Court of the position of the respective parties. Today we received an affidavit over the signature of Nathan Silverman, sworn to May 12, 1975, in behalf of Bankers Trust Company. The affidavit contains

both factual statements and a reference to legal authority. I beg leave of the Court to submit the instant letter and enclosures in connection with the Silverman affidavit

Firstly, the Court will observe that the motion of Bankers Trust Company dated February 20, 1973 addressed to the Supreme Court and seeking an Order of Dismissal of the Complaint as against Bankers Trust Company, was made under the authority of CPLR § 3211(a)(7) "on the ground that the said Complaint fails to state a cause of action as against the defendant Bankers Trust Company . . .".

The cases are legion that a dismissal based upon that ground is not on the merits unless the Order of Dismissal so provides, and a copy of the Order has not been submitted. CPLR § 5013 expressly so provides. The cases cited in the Silverman affidavit involve the defense of *res judicata* or collateral estoppel were raised after a trial on the merits which had resulted in each case in favor of the movant. Moreover, even if the disposition had been made on the merits, it is the position of plaintiffs that an action predicated on a violation of Rule 10b-5 is not precluded by an earlier State Court determination that common law fraud did not affect a securities transaction. This position is predicated on the proposition that § 27 of the Securities Exchange Act of 1934 grants exclusive jurisdiction to the Federal Courts to determine violations thereof, and consequently, an earlier State Court determination could not have involved a determination of liability under Rule 10b-5.

As to the factual allegations contained in the Silverman affidavit, I am submitting herewith portions of the transcript of the examination before trial of John B. Fowler, Jr., a defendant in the Supreme Court action, taken Sep-

tember 12, 1973, after the State Court had granted the motion to dismiss the Complaint. The Court can readily see that serious factual questions are presented.

Respectfully yours,

NOEL W. HAUSER
Noel W. Hauser

NWH:SL
encls.

cc: Sullivan & Cromwell, Esqs.
Attorneys for Deft. European-American Bank
48 Wall Street
New York, New York 10005

Hughes, Hubbard & Reed, Esqs.
Attys. for Defts. FDIC and FNB
One Wall Street
New York, New York

Charles Leeds, Esq.
Attorney for Bankers Trust Co.
1775 Broadway
New York, New York 10019

ATTACHMENT TO LETTER OF MAY 15, 1975

(21) Fowler, Junior—direct

A. Repeated the statement made by—
Q. Tell us what you said. A. That there were suits against Mr. Kates and that this stock was tied up in an escrow agreement.

Letter of Noel Hauser to Judge Pollack with Attachments, Dated May 15, 1975.

Q. Yes. A. And they assured me that it was not, that there was other stock in an escrow agreement, but not this stock, this had been freed from the escrow agreement.

Q. After you received that information from them what did you do about it? A. Well, I also talked to Mr. Silverman, who is the vice president of the Bankers Trust Company and said would you deliver.

Q. Was that Nathan Silverman, the general Counsel? A. Yes, that's the man, the man that was at the closing.

Q. What did he say? A. He assured me that they would deliver the stock.

Q. Did you ask him about the suits pending from Equity National against the Kates? A. He stated there was nothing involved, (22) that the stock was not involved.

Q. You mean Mr. Silverman told you that? A. The stock was not involved.

Q. Now, what else did you do, if anything, after you learned that there was a suit pending against Kates and against Bankers Trust, was it? A. No, there was no statement it was a suit at that time against Bankers Trust.

Q. Just against Kates? A. Just against Kates.

Q. Involving the stock. Did you do anything else to verify that Kates had a right to deliver the stock? A. No.

Q. You accepted the assurances? A. From Mr. Silverman.

Q. Mr. London? A. Mr. Kates and Mr. London, yes.

Q. You say Mr. Silverman assured you that Kates had a right to deliver stock? A. Yes, he did.

Q. And Mr. London assured you of that too? A. He did.

Q. Now, at these conversations where you got

Affidavit of Philip K. Howard in Support of Motion by European-American Bank and FDIC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 909 (MP)

AFFIDAVIT

SAMUEL MALLIS and FRANKLYN KUPFERMAN,

Plaintiffs,

—against—

FEDERAL DEPOSIT INSURANCE CORPORATION, EUROPEAN-AMERICAN BANK & TRUST COMPANY, FRANKLIN NATIONAL BANK and THE BANKERS TRUST COMPANY,

Defendants.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

Philip K. Howard, being duly sworn, deposes and says:

1. I am a member of the Bar of the State of New York and am associated with the firm of Sullivan & Cromwell, attorneys for European-American Bank & Trust Company (hereinafter "European-American"). I am familiar with the pleadings and proceedings heretofore had in this case. I submit this affidavit in support of the memorandum submitted by European-American and the Federal Deposit Insurance Corporation as receiver of Franklin National Bank; in particular, I submit this affidavit for the purpose of showing that the certificates in which plaintiffs

herein held an interest never represented securities that were listed on the American Stock Exchange.

2. Until recently, the common stock of Equity National Industries, Inc. was listed and traded on the American Stock Exchange. I obtained from the American Stock Exchange a copy of the listing application submitted by Equity National Industries, Inc. (attached hereto in part as Exhibit A). This application shows that 2,411,772 shares were originally listed and that 175,000 conditional shares, of which plaintiffs' certificates represented a portion, were not listed and would not be listed until "official notice of issuance".

3. In order to ascertain whether any or all of these 175,000 conditional shares were ever listed, on May 14, 1975 I reviewed the Equity National Industries, Inc. registration file with Mr. John Gaughran, the manager of the registration section of the American Stock Exchange. Mr. Gaughran said that in order to list such conditional shares, the issuer first must formally notify the American Stock Exchange that such additional shares should be listed. The Exchange would then prepare a "registration authorization" ticket which would indicate the number of additional shares to be registered. Upon payment to the Exchange of the listing fee for the additional shares, the shares would then be "listed".

4. The file indicated that none of the requisite steps for listing the 175,000 shares, or any part thereof, were ever taken; no notice was given, no listing fee was paid, and no "registration authorization" form was prepared. A "control card", showing the changes in the number of shares listed, omitted any reference to the conditional

shares and affirmatively indicated that these shares were never listed.

PHILIP K. HOWARD

Sworn to before me this
16th day of May, 1975

EILEEN L. FRANKLYN
Notary Public

EILEEN L. FRANKLYN
Notary Public, State of New York
No. 31-1303130
Qualified in New York County
Commission Expires March 30, 1977

Exhibit A Annexed to Affidavit of Philip K. Howard.

LISTING APPLICATION No. 8791 AMERICAN STOCK EXCHANGE

The listing application of Equity National Industries, Inc., which is set forth below was approved on October 15, 1970.

The papers and exhibits submitted by the Company in support of its application are available for inspection at the Library of the Exchange.

EQUITY NATIONAL INDUSTRIES, INC.

(Incorporated under the laws of the State of Delaware on February 9, 1968)

COMMON STOCK, $1 PAR VALUE
Cusip 294732 10 2

Atlanta, Georgia
October 8, 1970

ORIGINAL LISTING:

Equity National Industries, Inc. (the "Company") hereby makes application to the American Stock Exchange for the listing of:

2,411,772 issued and outstanding shares of its Common Stock, $1 par value per share ("Common Stock");

50,362 additional shares of its Common Stock, upon official notice of issuance, which represent the maximum number of shares which the Company may be obligated to issue to former shareholders of Cunningham Art Products, Inc., a Georgia corporation, acquired on August 28, 1968, if the earnings of the business formerly conducted by such company reach certain specified levels;

85,035 additional shares of its Common Stock, upon official notice of issuance, which represent the maximum number of shares which the Company may be obligated to issue to former shareholders of Hewett Studios, Inc., a Georgia corporation, acquired on October 28, 1968, if the earnings of the business formerly conducted by such company reach certain specified levels;

68,834 additional shares of its Common Stock upon official notice of issuance, which represent the maximum number of shares which the Company may be obligated to issue to former shareholders of Water Bonnet, Inc., a Florida corporation, acquired on February 14, 1969, if the earnings of the business formerly conducted by such company reach certain specified levels;

139,058 additional shares of its Common Stock, upon official notice of issuance, which represent the maximum number of shares which the Company may be obligated to issue to former shareholders of A&U Mobile Homes of North Carolina, Inc., a North Carolina corporation; A&U Mobile Homes, Incorporated, a Virginia corporation; A&U Sales, Incorporated, a Virginia corporation; and A&U Homes Corporation, a Virginia corporation, acquired on December 22, 1969, if the earnings of the businesses formerly conducted by these companies reach certain specified levels;

225,881 additional shares of its Common Stock, upon official notice of issuance, which represent the maximum number of shares which the

Company may be obligated to issue to former shareholders of Jordan Mills, Inc., a Georgia corporation, acquired on February 24, 1970, if the earnings of the business formerly conducted by such company reach certain specified levels;

12,000 additional shares of its Common Stock, upon official notice of issuance, which represent the maximum number of shares which the Company may be obligated to issue to former shareholders of Top Line, Inc., a Tennessee corporation, acquired on March 6, 1970, if the earnings of the business formerly conducted by such company reach certain specified levels;

9,000 additional shares of its Common Stock, upon official notice of issuance, which represent the maximum number of shares which the Company may be obligated to issue to former shareholders of Stain Glass Products, Inc., an Ohio corporation, acquired on September 12, 1969, if the earnings of the business formery conducted by such company reach certain specified levels;

400,000** additional shares of its Common Stock, upon official notice of issuance, which represent the number of shares which the Company may be obligated to issue to former shareholders of Marathon Finishers, Inc., a Georgia corporation, acquired on May 20, 1970, if the earnings of the business formerly

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** The exact number of shares which may be deliverable is presently not determinable and, accordingly, the number of shares reserved is an estimate made for purposes of the Listing Application.

conducted by such company reach certain specified levels;

150,000 additional shares of its Common Stock, upon official notice of issuance, which represent the maximum number of shares which the Company may be obligated to issue to former shareholders of Direct Carpets, Inc., a Georgia corporation. Direct Carpets, Inc., a Tennessee corporation, Mill End Wholesale, Inc., a Georgia corporation, Carpet Franchisers, Inc., a Georgia corporation, and Broadloom Carpets, Inc., a Georgia corporation, acquired on June 2[illegible], 1970, if the earnings of the business formerly conducted by Direct Carpets, Inc., a Georgia corporation, reach certain specified levels;

175,000 additional shares of its Common Stock, upon official notice of issuance, which represent the maximum number of shares which the Company may be obligated to issue to the former shareholders of Take Two, Inc., a New York corporation, acquired on August 7, 1970, if the earnings of the business formerly conducted by such company reach certain specified levels;

6,000 additional shares of its Common Stock, upon official notice of issuance, which represent the maximum number of shares which the Company may be obligated to issue to the former shareholders of Behamy & Company, Inc., and Casual Art Imports. Inc., both Georgia corporations, acquired on July 30, 1970, if the earnings of the businesses formerly conducted by such companies reach certain specified levels;

Exhibit A Annexed to Affidavit of Philip K. Howard.

50,000 additional shares of its Common Stock, upon official notice of issuance, upon exercise of stock warrants issued in connection with an 8% Senior 15-Year Note of the Company;

148,100** additional shares of its Common Stock, upon official notice of issuance, upon the conversion of an 8% Convertible Subordinated 15-Year Note of the Company;

12,000 additional shares of its Common Stock, upon official notice of issuance, upon exercise of Stock Warrants issued in connection with a Senior Term Note of the Company;

200,000 additional shares of its Common Stock, upon official notice of issuance, upon exercise of stock options granted or to be granted pursuant to the Company's Qualified Stock Option Plan;

50,000 additional shares of its Common Stock, upon official notice of issuance, upon exercise of stock options granted or to be granted pursuant to the Company's Qualified Stock Option Plan for Subsidiaries;

148,834 additional shares of its Common Stock, upon official notice of issuance, upon exercise of outstanding stock warrants;

2,240 additional shares of its Common Stock, upon official notice of issuance, upon exercise of outstanding nonqualified stock options; making a total of

4,344,116 shares of Common Stock, the listing of which is herein applied for (of a total authorized issue of 8,000,000 shares of Common Stock).

Exhibit A Annexed to Affidavit of Philip K. Howard.

All of the shares of Common Stock, the listing of which is herein applied for, are, or upon issuance and payment therefor will be, fully paid and nonassessable, with no personal liability attaching to the ownership thereof.

CAPITALIZATION

(September 30, 1970)

Class	*Authorized by Charter*	*Authorized for Issuance**	*Outstanding*	*Listing Applied For**
Preferred Stock, No Par Value	250,000	—	—	—
Common Stock, $1 Par Value	8,000,000	4,344,116	2,411,772	4,344,116

* Of the total shares of Common Stock authorized for issuance, 1,932,344 shares are unissued and reserved for issuance in the amounts and for the purposes set forth in the preceding section. There are no other unissued shares of Common Stock reserved for issuance for any purpose.

STOCKHOLDERS

As of June 30, 1970, there were 1,797 holders of record of the Company. No person is known by the Company to own, of record or beneficially, more than 10% of the Company's outstanding Common Stock.

As of June 30, 1970, the officers and directors of the Company, as a group (consisting of 10 persons), owned directly, indirectly or beneficially 351,542 shares of the Company's Common Stock, which represents 17% of the total outstanding shares of Common Stock.

Notice of Motion of Bankers Trust Company to Dismiss Complaint, Dated August 25, 1975 and Filed September 30, 1975.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the affidavit of Nathan Silverman, sworn to the 12th day of May 1975, the Reply Memorandum of Bankers Trust Company and Affirmation of Jack H. Weiner affirmed on the 8th day of August, 1975, and upon all of the pleadings, papers and proceedings heretofore served herein, the undersigned will move in this court before the Honorable Milton Pollack on the 25th day of August 1975 at 4:00 P.M. or as soon thereafter as counsel can be heard for an order pursuant to the Federal Rules of Civil Practice 12 (b) (6) dismissing Count III of the complaint as against Bankers Trust Company, upon the grounds that the pleading fails to state a claim upon which relief can be granted, that it further fails to provide jurisdiction in the United States District Court for such a claim against Bankers Trust Company and is barred by res judicata and collateral estoppel.

Dated: New York, New York
August 25, 1975

Yours, etc.,

CHARLES LEEDS

By LAWRENCE S. BERKOWITZ
Lawrence S. Berkowitz
A member of the Frm
Attorneys for Bankers Trust Company
1775 Broadway
New York, N.Y. 10019
(212) MU 2-5889

Letter of Noel W. Hauser to Judge Pollack, Dated August 29, 1975.

August 29, 1975

Honorable Milton Pollack
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

RE: Mallis, et ano v. Federal Deposit Insurance Corp., et al.
75 Civ. 909 (M.P.)

Dear Judge Pollack:

At the Conference before the Court on August 25, 1975, which was attended by counsel for all parties, Your Honor indicated a disposition to dismiss all counts of the Complaint because of the failure to state a Federal claim against any of the defendants. As the attorney for plaintiffs I have requested an additional period of time within which to submit further argument or documentation to support the existence of a Federal claim in favor of my clients, the plaintiffs. The Court indicated a willingness to accept and consider further writings on the subject.

As to the claim of the plaintiffs against Bankers Trust Company under the Anti-Fraud Provisions of the Federal Securities Laws, the Court indicated that its thinking was that the Complaint was defective because the plaintiffs were not either "purchasers" or "sellers" of the securities in question and that the decision by the United States Supreme Court two or three months ago in the Blue Chip case dictated that the Anti-Fraud Provisions of the Federal Securities Laws may be invoked only by such purchasers or sellers. As I indicated to the Court during the course of discussion, I believe that the Blue Chip case goes no further than to hold that a party who claims he

would have purchased stock, but did not do so because of a securities fraud, has no claim. The decision in the Blue Chip case discusses at length the difficulties of dealing with a non-actor who subjectively claims that he would have acted except for the fraud.

I respect the interpretation by the Court that the decision in the Blue Chip case mandates strict adherence to the so-called "Birnbaum" doctrine, but I would urge the Court to consider whether such strict adherence is indeed required, given the decision by the United States Supreme Court in *Superintendent of Insurance* v. *Banker's Life Insurance Co.*, et al., 404 U.S. 6 (1971). In that case, the owner of all of the stock of Manhattan Casualty Co. sold the same to a vendee which used the assets of the Manhattan Casualty Co. with which to pay the price of the stock to the seller. Neither the purchaser nor the seller, therefore, suffered injury. The injury was suffered by creditors of Manhattan Casualty Co. whose assets had thereby been depleted. In reversing the dismissal of the Complaint by the Second Circuit, the United States Supreme Court pointed out that the creditors of the party injured through a violation of the Anti-Fraud Securities Laws had a legitimate interest in seeking redress upon a showing of grevious injury. Assuming that the plaintiffs in the instant case are, strictly speaking, not "purchasers" of the securities in question, they certainly have suffered substantial damages and certainly an issue of fact is raised as to whether Bankers Trust Company was under a duty to disclose all of the facts at its disposal. In the cited case, the Superintendent of Insurance was acting as the surrogate of creditors of Manhattan Casualty Co. If the Court is nevertheless disposed to strictly adhere to the "Birnbaum" doctrine and to rule that the count as against Bankers Trust Company must be dismissed because plaintiffs are mere creditors of the actual purchasers, Fowler and Arnold, I would respectfully urge the Court to consider entertaining an application by plaintiffs, pursuant to Rule 19(a) and (b) of the Federals Rules of Civil Procedure for an order directing the joinder of Fowler and Arnold as involuntary parties plaintiff, or as defendants. The claims asserted by the plaintiffs in this case are not ephemeral or based upon subjective conditions; the damages suffered by them are real and I respectfully urge that dismissal of the count as against Banker's Trust Company, because plaintiffs are not, strictly speaking, "purchasers", would result in a miscarriage of justice, particularly so since as the papers before the Court demonstrate, the Supreme Court of the State of New York has dismissed the claim of the plaintiffs as against the Banker's Trust Company for failure to demonstrate the elements of a fraud case under State Law.

With respect to the claims of the plaintiffs as against the remaining defendants, we stand upon the arguments previously advanced.

Should the Court be inclined to entertain an application to join Fowler and Arnold as involuntary party plaintiffs or as necessary defendants, I would appreciate word from Chambers as to the foregoing effect and I would then proceed to the preparation of formal motion papers.

A copy of this letter is being forwarded to counsel for all the parties.

Respectfully yours,

Noel W. Hauser

NWH:jw

cc: Sullivan & Cromwell—European-American Bank
Hughes, Hubbard & Reed—Federal Deposit
Charles Leeds, Esq.—Bankers Trust Company

Decision of the District Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 909 (MP)

MEMORANDUM

#43153

SAMUEL MALLIS and FRANKLYN KUPFERMAN,

Plaintiffs,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, EUROPEAN-AMERICAN BANK & TRUST COMPANY, FRANKLIN NATIONAL BANK and THE BANKERS TRUST COMPANY,

Defendants.

APPEARANCES:

HAUSER & ROSENBAUM
Attorneys for Plaintiffs
350 Fifth Avenue
New York, N.Y. 10001
By: Noel W. Hauser, Esq.

HUGHES HUBBARD & REED
Attorneys for Defendant (Federal Deposit Insurance Corporation as Receiver of Franklin National Bank)
One Wall Street
New York, N.Y.
By: Robert S. Anderson, Esq.

Decision of the District Court.

SULLIVAN & CROMWELL
Attorneys for Defendant (European-American Bank & Trust Company)
48 Wall Street
New York, N.Y.
By: John L. Warden, Esq.

Charles Leeds, Esq.
Attorney for Defendant (Bankers Trust Company)
1775 Broadway, New York, N.Y. 10019
By: Nathan Silverman, Esq.

MILTON POLLACK, District Judge.

Federal Deposit Insurance Corporation (FDIC hereafter) and European American Bank (EA) are successors in interest to an insolvent, Franklin National Bank (FNB).

Plaintiffs, two dentists, borrowed $156,000 from FNB on March 3, 1972, and now claim that the loan (reduced substantially by repayments on account) violated Regulation U (Federal Reserve Regulations 12 CFR Section 221.1 et seq.) prohibiting loans secured by margin stock in an amount in excess of the prescribed maximum loan value of the stock. Plaintiffs contend in their first claim for relief that the loan was made for the purposes of carrying or acquiring margin stock and is therefore void and that it should be declared that they are not liable thereon.

Since the loan was neither directly nor indirectly made for the purpose of carrying or purchasing "margin stock" or being secured thereby nor were the arrangements with plaintiffs interposed as a subterfuge for avoidance of Regulation U by FNB, the first claim fails to state a claim on which federal relief may be granted.

Plaintiffs, Mallis and Kupferman, arranged the loan from FNB based solely on their signatures to a loan agreement. Their purpose was to take advantage of a busi-

ness opportunity which they hoped would yield them a $50,000 profit. The opportunity involved the loan by them of money to one Fowler and his attorney Arnold on the obligation to repay the same on certain conditions with a $50,000 bonus or profit for the accommodation. Fowler had made a deposit toward the purchase of 40,000 shares of Equity National Industries, Inc., and needed more funds in order to complete the purchase. The shares were held by Bankers Trust Company, a defendant herein, as collateral for a loan to the shares' owners, Jerome and Judith Kates, who were the sellers in the transaction with Fowler.

The shares were unregistered, but Arnold is alleged to have represented to Mallis that they would become marketable in the near future because of a new rule promulgated by the Securities Exchange Commission. The shares if marketable would have, according to plaintiffs, been worth at least $400,000.

In actuality, the shares were subject to a restriction that ultimately made them worthless. They had been issued to the Kates pursuant to the agreement by which a company called Take-Two, Inc. was merged into a subsidiary of Equity. The two certificates for the shares bore legends indicating that the shares had not been registered under the Securities Act and could not be transferred except in accordance with an escrow agreement to which they were subject. Under the escrow agreement, depending on whether specified earnings conditions for the prior business of Take-Two were met for specified years, the shares would be returned to Equity to be either cancelled or reissued without the restrictive legend referring to the escrow agreement.

By letter of March 1, 1971, Equity wrote to Bankers Trust, which held the shares as collateral on an August 1970 loan to the Kates, indicating that the earnings requirement had not been met for 1970 and requesting that the Equity shares issued to the Kates be delivered to

Equity in accordance with the escrow agreement. Bankers Trust declined to do so. Equity brought suit in New York to obtain a cancellation of the shares but the suit did not proceed to a judicial determination. Equity ultimately brought suit in Delaware state court in May 1974 to obtain or to void the certificates of stock, naming the plaintiffs, the Kates, and FNB as defendants, but not Bankers Trust. This suit also did not go to judgment. Plaintiffs allege that the shares are now worthless, and indeed were worthless at the time of the Mallis-Arnold-Kates agreement culminating in their sale. At the closing of the sale, the funds transferred to Kates as consideration for the stock were turned over to Bankers Trust in payment of the outstanding indebtedness of the Kates to Bankers Trust. Bankers Trust then released the stock. Plaintiffs took the shares as collateral for their loan to Arnold and Fowler and now hold them after default by those borrowers.

Plaintiffs, as noted *supra*, seek to cancel their own indebtedness to FNB and its successors by alleging that the loan to them was in violation of Regulation U of the Board of Governors of the Federal Reserve System, 12 C.F.R. § 221.1 *et seq.*, as having been secured by stock for the purpose of purchasing or carrying "margin stock" in an amount in excess of the prescribed maximum loan value of the collateral.

Plaintiffs' allegations on this point fall short of adequacy in at least two ways, even assuming *arguendo* that they have sufficiently alleged that the loans were secured by stock. *Cf. Freeman* v. *Marine Midland Bank-New York*, 494 F.2d 1334 (2d Cir. 1974). The shares in question here were not "margin stock" within the meaning of Regulation U, and there was no loan for the purpose of purchasing stock within the meaning of that regulation.

The only definitional category of margin stock which arguably applies to the certificates of Equity common stock

involved herein is that of stock "registered on a national securities exchange". It appears that listed shares of Equity common stock were in fact registered and traded on an exchange at the time of the transaction herein. However those shares here involved were neither registered nor listed on a national securities exchange.

EA and FDIC have introduced the listing application submitted to the American Stock Exchange by Equity for the listing of a number of categories of common stock including "175,000 additional shares of its common stock, *upon official notice of issuance*, which represent the maximum number of shares which the Company may be obligated to issue to the former shareholders of Take-Two, Inc. . . . if the earnings of the business formerly conducted by such company reach certain specified levels." (emphasis added) (Exhibit A to Howard affidavit, May 16, 1975).

In order for such shares to have been actually listed, Equity would have had to formally notify the Exchange that the conditions had been met, a "registration authorization" indicating the number of shares would have had to be prepared by the Exchange, and a listing fee would have had to be paid by Equity. A review of the American Stock Exchange file indicated that none of these steps had ever been taken, and that the shares were never listed, which is hardly surprising given Equity's efforts to have the shares returned to it. (*See* Howard affidavit, *supra*, ¶¶ 3 and 4).

Contrary to plaintiffs' assertions, shares of stock are not "registered" on a securities exchange within the meaning of Regulation U when they are not themselves listed merely because other shares of their class are listed. *See* Published Interpretations of the Board of Governors of the Federal Reserve System, ¶ 6440 (1971) (Regulation U not applicable to loan to purchase newly issued stock during initial over the counter trading period prior to the stock "becoming registered (listed) on a national securities

exchange"). The opinion letter of an attorney for the Board of Governors submitted to this Court by the plaintiffs is not dispositive here since the question the attorney was answering is not on point with the issue in contention. Since the Equity shares purchased from the Kates were not registered on a national securities exchange and fit into no other category set out in Regulation U, they were not "margin stock" within that regulation's meaning.

Regulation U bars a grant of credit directly or indirectly secured by any stock for the *purchase* or carrying of margin stock. EA and FDIC argue that the only situation in which Regulation U applies to loans made to a borrower who in turn relends the funds to a third person for the purchase of stock is if the initial borrower is engaged principally or as one of his important activities in the business of extending credit for the purpose of purchasing margin stock. *See* 12 C.F.R. § 221.3(q). They argue that if Regulation U applied to every loan of the type in this case, 12 C.F.R. § 221.3(q) would be superfluous.

It may well be that Regulation U would nevertheless be applicable if the initial borrower were simply interposed as a subterfuge for a bank's avoiding the regulation but that is plainly not the situation here. Plaintiffs were clearly more than nominal intermediaries between FNB and Arnold in light of their own prospective profit. Thus, it cannot be fairly argued that the loan by FNB to the plaintiffs was made for the purpose of purchasing stock within the meaning of Regulation U, even though the funds were ultimately used by Arnold to purchase stock.

As a second claim for relief, plaintiffs allege a pendent claim against FNB based on allegations of common law fraud consisting of alleged misrepresentations of an officer of FNB to the effect that he had reviewed the transaction and that it was regular in all respects. Since there is no federal basis for this suit, there being no Regulation U claim, there is no basis for pendent jurisdiction and the

second claim must therefore be dismissed. Leave to amend to assert this claim under Rule 10b-5 of the Rules and Regulations promulgated pursuant to Section 10b of the Securities and Exchange Act of 1934, as amended, will be denied as unavailing to plaintiffs who were not purchasers within the requirement of the *Birnbaum* doctrine, *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952), as adopted in *Blue Chip Stamps* v. *Manor Drug Stores*, 43 U.S.L.W. 4707 (June 9, 1975), —— U.S. —— (1975).

The mere acceptance of a stock pledge as collateral in a privately negotiated transaction between borrower and lender does not of itself bring a transaction within the scope of the federal securities laws. *See, e.g., McClure* v. *First National Bank of Lubbock, Texas*, 497 F.2d 490 (5th Cir. 1974), *cert. denied* 43 U.S.L.W. 3449 (1975); *Rosen* v. *Dick*, [1974-75] CCH Fed. Sec. L. Rep. ¶ 94,786 (S.D.N.Y. Sept. 3, 1974). Thus, even if the FNB loan to Mallis and Kupferman were secured by a pledge of the Equity stock, which is disputed by EA and FDIC, plaintiffs could still not state a claim entitling relief under Rule 10b-5 on that basis since no purchase or sale was involved.

Similarly, there was no purchase by plaintiffs in this case. Plaintiffs loaned the funds to Arnold and Fowler, who had already contracted to buy the stock in question. While the stock later came into plaintiffs' possession as collateral for their loan, the consideration for that loan was the obligation by Arnold and Fowler to repay with a bonus. Attempts to characterize the transaction as a purchase of the stock by plaintiffs are not convincing. To allow persons in plaintiffs' situation to sue under Rule 10b-5 would be to expand the class of prospective litigants under that rule to an extent unealed for by the words of the rule or the statute. *Cf. Bolger* v. *Laventhol, Krekstein, Horwath & Horwath*, 381 F. Supp. 260, 267 (S.D.N.Y. 1974).

The third claim seeks relief only against Bankers Trust Company for orally asserting that the stock certificates were no longer subject to the restrictive legend thereon tieing them to an escrow agreement while allegedly having knowledge that the certificates were void.

While this third claim is predicated on fraud under the Securities Act of 1933, as amended, no federal claim is asserted on which relief may be granted since plaintiffs were not "purchasers" of the securities. For the same reason, plaintiffs' offer to amend their complaint to assert a claim under § 10 of the Securities Exchange Act based on this allegation would be unavailing; permission to so amend is denied.

With respect to their offer to amend this third claim, plaintiffs claim that strict adherence to the *Birnbaum* purchaser-seller requirement for 10b-5 suits is no longer mandated in light of the holding in *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971). This claim is unpersuasive in light of the fact that the plaintiff in *Bankers Life* (the liquidator of Manhattan Casualty Co.) was clearly within the scope of the *Birnbaum* rule. *See Haberman* v. *Murchison*, 468 F.2d 1305, 1311 n.5 (2d Cir. 1972).

In *Bankers Life* the Supreme Court recognized that creditors of a corporation in the process of being liquidated have an interest in a suit brought by the liquidator, but the Court carefully added that

> . . . the fact that creditors of the defrauded corporate buyer or seller may be the ultimate victim does not warrant disregard of the corporate entity . . . The crux of the present case is that *Manhattan* [the corporate seller] suffered an injury as a result of deceptive practices touching *its* sale of securities as an investor. *Bankers Life*, *supra*, at 12-13 (emphasis added)

Opinions in the Second Circuit since *Bankers Life* have reaffirmed the vitality of the *Birnbaum* purchaser-seller doctrine except in a few narrow and irrelevant categories of cases. *Haberman, supra; International Controls Corp.* v. *Vesco*, 490 F.2d 1334, 1343, 1346 n.16 (2d Cir. 1974); *Petersen* v. *Federated Development Co.*, 387 F. Supp. 355, 358 (S.D.N.Y. 1974); *Gurvitz* v. *Bregman*, 379 F. Supp. 1283, 1286 (S.D.N.Y. 1974); *Davidge* v. *White*, 377 F. Supp. 1084, 1087 (S.D.N.Y. 1974); *Goodall* v. *Columbia Ventures, Inc.*, 374 F. Supp. 1324, 1329 (S.D.N.Y. 1974).

Leave to join Arnold and Fowler as involuntary parties pursuant to Rule 19 of the Federal Rules of Civil Procedure is also denied.

Rule 19(a) provides that

> [a] PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. . . .

None of the requirements of this Rule are satisfied by plaintiffs' request. In the absence of Arnold and Fowler "complete relief" can be "accorded among those already parties." Dismissal of this action would in no way "impair or impede" the ability of Arnold and Fowler to "protect their interests," nor would it "leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

The general rule is that if the merits may be determined without prejudice to the absent party, the Court "will strain hard to reach that result." *Bourdieu* v. *Pacific Oil Co.*, 299 U.S. 65, 70 (1936); *Charron* v. *Meaux*, 60 F.R.D. 619, 622 (S.D.N.Y. 1973).

FDIC has joined in the motion to dismiss submitted by EA and FDIC and EA have submitted a joint brief setting forth their discussion on the viability of the complaint. The positons of those two defendants are identical on these issues. The motion is granted. The first claim is dismissed for failure to state a federal claim upon which relief can be granted. The second claim is a common law claim pendent for jurisdiction on the first claim and is consequently dismissed for lack of subject matter jurisdiction over it.

Bankers Trust submitted two affidavits to the Court urging dismissal of the third claim in the complaint which is asserted against it alone. The plaintiffs have presented their legal arguments on this point and have responded to the Bankers Trust affidavits. That motion is granted. The third claim for relief, the only one directed towards Bankers Trust, is dismissed for failure to state a claim upon which relief can be granted and for lack of jurisdiction over the subject matter of the controversy attempted to be raised therein.

It appears that FNB is an insolvent, whose interests in this case have passed to FDIC and/or EA, and it thus seems appropriate to terminate this litigation in this Court by dismissing the claims as to FNB as well.

Complaint dismissed in its entirety.

So ORDERED.

September 30, 1975

MILTON POLLACK
U.S. District Judge

Addendum to Memorandum Opinion of Pollack, D.J., Dated October 2, 1975.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 909 (MP)

MEMORANDUM

SAMUR MALLIS and FRANKLYN KUPPERMAN,

Plaintiffs,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, EUROPEAN-AMERICAN BANK & TRUST COMPANY, FRANKLIN NATIONAL BANK and THE BANKERS TRUST COMPANY,

Defendants.

APPEARANCES:

HAUSER & ROSENBAUM
Attorneys for Plaintiffs
350 Fifth Avenue
New York, N.Y. 10001
By: Noel W. Hauser, Esq.

HUGHES HUBBARD & REED
Attorneys for Defendant (Federal Deposit Insurance Corporation as Receiver of Franklin National Bank)
One Wall Street
New York, N.Y.
By: Robert S. Anderson, Esq.

Addendum to Memorandum Opinion of Pollack, D.J., Dated October 2, 1975.

SULLIVAN & CROMWELL
Attorneys for Defendant (European-American Bank & Trust Company)
48 Wall Street
New York, N.Y.
By: John L. Warden, Esq.

CHARLES LEEDS, Esq.
Attorney for Defendant (Bankers Trust Company)
1775 Broadway, New York, N.Y. 10019
By: Nathan Silverman, Esq.

MILTON POLLACK, District Judge

Since the filing of the decision in this case, defendant Federal Deposit Insurance Corporation has called the Court's attention to 12 U.S.C. § 1819 (1970), which authorizes suit against this defendant in the federal courts on a state law claim.

Accordingly, the dismissal of Count 2 against this defendant is set aside and liability or any other matter pertaining to that claim alone may be reargued. Counsel should submit briefs accordingly within 10 days hereof.

So ORDERED.

October 2, 1975

MILTON POLLACK
U.S. District Judge

Letter of Noel W. Hauser to Judge Pollack with Attachment, Dated October 1, 1975.

LETTERHEAD OF HAUSER & ROSENBAUM, P.C.

October 1, 1975

Honorable Milton Pollack
United States District Judge
Chambers of the United States Courthouse
Foley Square,
New York, New York

Re: Mallis and Kupferman
—v—
Federal Deposit Insurance Corporation, et al.
75 Civ. 909

Honorable Sir:

Reference is made to my letter to the Court of August 29, 1975 wherein I advanced certain arguments in support of the proposition that the plaintiffs herein should not be denied their day in Court as against Bankers Trust Company, because they were not "purchasers" in the strict sense of the term.

I have obtained a copy of the deposition of Jack Arnold taken in the action commenced by Mallis in Supreme Court, New York County. Arnold was an attorney who executed the investment letter and who appears to be the record purchaser of the securities in question.

At page 15 of the deposition, which was taken on October 10, 1975, Arnold testified (at pp. 15-16) that Mallis' participation was not necessarily that of a lender, but rather as an investor. Copies of those pages are enclosed.

At page 20 of the deposition, he states that in executing the letter of investment, he acted for other as well as

himself. At page 22 of the deposition, he states that he acted for Mallis. Copies of the pages referred to are enclosed.

I would respectfully urge that Arnold's testimony leaves open the question as to whether Mallis was a buyer of a part of the "deal" or whether he was a financier thereof. While it is true that Mallis' compensation was to be limited to $50,000., it is likewise true that the entire transaction might be construed as one where Arnold acted as agent for several purchasers, of whom Mallis was one, with an understanding that the agent's compensation was to include all profit arising from the transaction above that required to reimburse Mallis and yield to him the agreed upon profit of $50,000.

I would respectfully suggest that a mixed question of fact and law is presented as to the nature of Mallis' participation, and that the issue should await a trial.

Respectfully yours,

Noel W. Hauser

NWH:SL
encls.

cc: Sullivan & Cromwell, Esqs. (Attys. Deft. European)
48 Wall Street
New York, N. Y. 10005

Charles Leeds, Esq. (Atty. Deft. Bankers Trust)
1775 Broadway
New York, N. Y. 10019

Hughes, Hubbard & Reed, Esqs. (Attys. Defts. FDIC & FNB
One Wall Street
New York, New York

ATTACHMENT TO LETTER OF OCTOBER 1, 1975.

(15) A. I would says this is the letter.

Mr. Epstein: Referring to Plaintiff's Exhilbt 6, marked for identification in the examination of the Defendant, Fowler, a letter dated March 3rd, 1972.

Q. Now, is that the letter that you prepared on March 1st? A. Yes, sir, or the last day of February.

Q. You gave him an unsigned one, did you not? A. That is correct.

Q. Did this reflect the agreement between you? A. That's right.

Q. Was it your understanding that he was making a loan or making an investment? A. Well, actually it's very difficult to determine what one has in his mind. As far as I was concerned, he was putting up a hundred and fifty thousand dollars in the deal, and he was to get back his money plus fifty thousand dollars. Whether it was a loan or an investment, I don't know, how he would state it.

Q. Upon the remittance of his investment (16) plus $50,000? A. Yes.

Q. What was in your mind when you drew up the papers, signed your signature on the document? A. What was in my mind?

Q. Was it an investment, or a loan? A. It's very hard to be more specific.

Q. It was very hard to be specific what this agreement is? A. An investment, it can also be a loan as well.

Q. You are dilly-dalling with me. A. No, I am not, I am answering the question as best as I can possibly answer it.

Q. In a letter of March 3rd, 1972, you, an experienced lawyer since 1939 or 1940, wrote the word "investment", is that what you mean? A. Probably.

Q. Did you execute a promissory note? A. No.

Q. Did you give him a mortgage? A. No.

Q. Did you give him any security agreement?

• • • • • •

(20) Q. When you signed this agreement or this letter dated March 3rd 1972, Plaintiff's Exhibit 6, for identification, you signed J. Arnold, as attorney, did you not? A. Yes.

Mr. Gluskin: Did you say as an attorney?

Q. Who were you acting for, as you signed that letter? A. I was acting for other people as well as myself.

Q. Which people? A. John Fowler, Mallis, myself, and prior to this deal being consummated, on that day I previously arranged to give Kates $25,000 myself, as the down payment on the sale, and I had somebody who was participating in that with me, who didn't wish to appear in the transaction, and I was acting on his behalf.

Q. On whose behalf?

Mr. Gluskin: I don't think he is at privilege to disclose it.

Mr. Epstein: No.

• • • • • •

(22) Q. Will you fill it in? A. If I can, I will fill it in.

Q. Do you have any records of it? A. I have a record of where they were at that time.

Q. That's the address I want. A. Yes.

Q. Can you fill it in when you execute this examination, if I leave a blank space for this purpose? A. Sure.

(INSERT)

Letter of Noel W. Hauser to Judge Pollack with Attachment, Dated October 1, 1975.

Q. Now, you said in your last answer that among others you were acting for Dr. Mallis, too, is that correct? A. Well, I was talking for everybody, but he also had his own men there as well. Well, I was talking for John Fowler, he was there, as well as I was talking for these people. I took the deal in my name rather than physically speaking for them.

Q. You signed that letter dated March 3rd 1972, addressed to Dr. Samuel Mallis, Plaintiff's Exhibit

• • • • • •

Confidential Litigation Record Prepared for Franklin National Bank.

CONFIDENTIAL LITIGATION RECORD
Specializing in Daily Reports of Litigation in
1/17/72
Greater New York, Westchester and Nassau Counties and Northern New Jersey
8/10/72
241 Broadway, New York 3, N. Y. Telephone: SPring 7-7300
7/12/73

RECORD ON: Creative Cinema, Inc.

ADDRESS: 675 5th Ave., New York, N.Y.

(CODE)

Code	Cause
AD	Advertising
AG	Agreement
AT	Attachment
BC	Breach of Contract
BE	Bill of Exchange
BO	Bond
BW	Breach of Warranty
CF	Confession of Judgment
CH	Check
CO	Commission
CS	Consult Our Office
CT	Contract
CV	Conversion
DR	Draft
FL	Foreclosure on Lien (Chattel)
FM	Foreclosure on Lien or Mortgage (Real Estate)
FR	Fraud
GA	Garnishee
GS	Goods Sold & Delivered
GU	Guarantor
JU	City Court Judgment
LE	Lease
ML	Money Loaned
MR	Money Had & Received
NS	Not Stated
NT	Note or Notes
PR	Premium (Insurance, etc.)
RE	Rent Not Summary or Holdover Proceedings
RP	Replevin
ST	Storage
SV	Services
SJ	Suit on Judgment
TA	Trade Acceptance
UT	Undertaking
VI	Fine, Penalty or Violation
WA	Wage Assignment
WG	Wages
WL	Work, Labor & Services
WM	Work, Labor & Services and Materials Furn.

Date	Amt.	S or J	Plaintiff	Nature of Action
8-8-63	113.50	S	Jef Air Service	WL
10-3-63	545.92	S	Esposito Brothers	GS
10-9-63	227.40	S	Victor Business Machine Co.	GS
10-26-63	1,412.16	S	Mecca Film Laboratories Corp.	WL
10-24-63	444.30	S	Empire State Messenger Service, Inc.	SV
10-21-63	293.63	S	Filmsounds, Inc.	WL
10-22-63	271.31	S	Camera Equipment Co., Inc.	GS
10-28-63	79.47	S	Hartford Accident & Indemnity Co.	PR

In accepting this report, the subscriber agrees that the information contained herein has been compiled from sources and by persons deemed reliable, the accuracy of which is in no way guaranteed.

RECORD FOR: Fr Natl Bank

Confidential Litigation Record Prepared for Franklin National Bank.

Date	Amt.	S or J	Plaintiff	Nature of Action
11-4-63	83.64	S	Plaza Paint Supply Corp.	GS
11-4-63	145.91	S	M. Epstein's Son, Inc.	GS
11-14-63	117.65	S	Mercury Service Systems, Inc.	WL
12-3-63			General Assignment Filed for the Benefit of Creditors; Assigned to Stanley B. Hendler 10 E. 42nd St., New York, N.Y. Atty; Leinwand, Maron & Hendler 10 E. 40th St., New York, N.Y.	
11-26-63	1,689.74	S	Pathe Laboratories, Inc.	WM
Creative Cinema, Inc. & Kates, J.B. aka Kates, Jerome B. Served at; 675 5th Ave., New York, N.Y.				
10-2-63	1,210.00	S	Criterion Film Laboratories, Inc.	NT
12-9-70	231.95	S	Carl Moskowitz Assignee TV Competitive Research, Inc. Atty; M.J. Watkins 350 5 Ave., NYC	WL
12-30-70	295.40	S	S & H Messenger Service Atty; I. Finkston 305 B'way, NYC	SV
1-6-71	2,200.00	S	Motion Picture Camera Supply Inc. Atty; Jacobson & Schwartz 160 Broadway, NYC	GS
1-15-71	2,251.69	S	Stuart Gellman Editorial Inc. Atty; Kletsky, Workman, etc. 66 Court St., Bklyn	WL
2-4-71	218.35	S	Harvey Limousine Service Atty; Buchdahl & Lempel 276 5 Ave., NYC	WL
2-16-71	150.68	S	Postalia Corp. Atty; S.K. Field 401 Bway, NYC	SV
3-5-71	1,582.00	S	Diners-Fugazy Travel Inc. Atty; Philip Adelman 10 Columbus Circle, NYC	SV
3/29/71	1103.61	S	S O S Photo-Cine-Optics Inc. Atty Galpeer-Altus 245 Park Ave. NY	GS

Confidential Litigation Record Prepared for Franklin National Bank.

Date	Amt.	S or J	Plaintiff	Nature of Action
3/29/71	8170.18	S	F & B/Ceco Inc. of Calif. Atty Galpeer-Altus 245 Park Ave. NY	GS
3/29/71	1780.11	S	F & B/Ceco Inc. Atty Galpeer-Altus 245 Park Ave. NY	GS
Creative Cinema Inc. Address Not Stated				
11/12/63	401.00	S	Owan Davidson Served at 84 William St. NY	WM
Kates, Jerome B.				
3/30/64	Not Given	S	Florman & Babb, Inc. Served at 222 E. 44th St. NYC	GS
Kates, Jerry				
10/1/71	301.50	S	Lentini Creations, Ltd. Attys: Estrow & Levy 529—5th Avenue, NYC	GS
Kates, Jerry dba Take "3" Served at 222 E. 44th St. NYC				
5/15/72	2233.53	S	Lippman Film Service Attys: McKay & O'Keefe 360 Lexington Ave. NYC	SV
1/4/72	460.83	J	Manuf. Hanover Trust Co. Atty: Paul W. Miller, Jr. 1968 Wantagh Avenue, Wantagh LI	Judg
4/7/72	121,506.25	J	Equity Natl. Ind. Inc. Attys: Weiss, Bronston, Rosenthal, Etc. 295 Madison Avenue NYC	Judg
7/6/72	2690.06	S	Beverly Hills Hotel Atty: D R Rothkopf Address Not Stated	SV
Kates, Jerome B. & Judith Served at 80 Poplar Dr., Roslyn NY				
7/20/71	54,795.25	J	Bankers Trust Co. Atty: Charles Leeds 750 3rd Avenue, NYC	Judg
Kates, Jerome B. Served at 78—5th Avenue, NYC				
7/26/71	799.76	S	Sonesta International Hotels Corp. Atty: L. Lambut 2 W. 59th St. NYC	MD
Kates, Jerome B. & Judith Served at 231 Harbor Hill Road, E. Hills				
3/5/71	520.00	J	State Tax Commission	Judg

Confidential Litigation Record Prepared for Franklin National Bank.

Date	Amt.	S or J	Plaintiff	Nature of Action
Kates, Jerome B.			Served at; 231 Harbour Hills Rd. E. Hills, NY	
1-13-64	231.00	J	F.A. Bartlett Tree Expert Co.	Judg
5-3-67	147.06	S	Saks & Co. Atty: Corey, Holton, Etc. 91-31 Queens Blvd., Queens	GS
5-12-67	85.23	S	Russell Motors, Inc. Atty: J.M. Decker Address not stated	WL
			Judgment Filed 7-12-67 $113.00	
5-12-67	300.00	S	Izso & Vergati Inc. Atty: J.M. Decker Address not stated	WL
			Judgment filed 7-12-67 $346.00	
8-7-67	177.53	S	Merit Rent A Car Atty: L.K. Batzar Address not stated	$Due
			Judgment filed 8-23-67 $239.00	
3-11-68	2,959.87	S	The Diners Club, Inc. Atty: Leonard M. Weil 10 Columbus Circle, NYC	BC
1-20-69	1,200.00	J	City of N.Y.	Judg
4-7-69	232.31	S	Phila, Sheraton Corp. Atty: M. Schlissel 276 5th Ave., N.Y.C.	SV
Kates, Jerome B. & Take Two, Inc.			Served at; 78 5th Ave., N.Y.C.	
1-8-68	3,508.45	S	Carl Fisher & Carl Fisher Productions, Inc. Atty: Franklin & Weinrib 600 Madison Ave., N.Y.C.	BC, SV
1-6-69	3,431.48	S	Gotham Recording Corp. Atty: Dublirer & Haydon 76 Beaver St., N.Y.C.	GS
Take Two Inc.			Served at; 80 5th Ave., N.Y.C.	
11-17-69	59.60	S	L.I. Insurance Co. Atty: Marcus Seberl 156 William St., N.Y.C.	PB

Confidential Litigation Record Prepared for Franklin National Bank.

Date	Amt.	S or J	Plaintiff	Nature of Action
2-16-70	1,342.09	S	Nat'l Recording Studios, Inc. Atty: Joel C. Pender 295 Madison Ave., N.Y.C.	WM
Take Two Inc.			Served at; 230 Park Ave., N.Y.C.	
12-15-69	53.44	S	R.C.A. Global Communications Atty: Frank & Frank 400 Madison Ave., NYC	GS
Take Two Inc.			Served at; 78 5th Ave., NYC	
9-26-67	214.36	S	Maxwell Supply Corp. Atty: H. Resnik 25 W. 43rd St., N.Y.C.	GS
11-22-67	923.31	S	Motion Picture Camera Supply, Inc. Atty: Spector & Paley 50 W. 57th St., N.Y.C.	Rental
12-12-67	12,706.66	S	General Camera Corp. & G.C. Sales Atty: Scioscia & Lashley 16 Court St., Bklyn	BC
3-5-68	117.36	S	Hilton Hotel Int'l, Inc. Atty: Sennet & Schultz 295 Madison Ave., N.Y.C.	SV
4-19-68	7,500.00	S	David J. Hershman Atty: Zuckborg & Z. 261 Broadway, NYC	BC
5-15-68	165.36	S	North River Insurance Co. Atty: Ira H. Subin 51 Chambers St., NYC	PB
5-21-68	71.30	S	Graphic Arts Photo Service Atty: Scheiman, A.M. & T. Time & Life Bldg., NYC	WL
8-9-68	2,100.00	S	Leonard Mandelbaum, Inc. Atty: Kramer & Labaton 295 Madison Ave., N.Y.C.	WM
10-10-68	4,729.87	S	The Optical House, Inc. Atty: Nathaniel M. Sokolski 10 E. 40th St., NYC	WL

Confidential Litigation Record Prepared for Franklin National Bank.

Date	Amt.	S or J	Plaintiff	Nature of Action
11-4-68	811.25	S	Hawaiian Village Atty: Richter & Levy 30 E. 42nd St., NYC	$Due
11-12-68	553.02	S	Reeves Broadcasting Development Atty: Blum & Sussman 30 W. 42nd St., N.Y.C.	WM
12-6-68	401.39	S	Eastman Kodak Co. Atty: G. Marshall 60 E. 42nd St., N.Y.C.	GS
12-23-68	173.25	S	Vanleigh Furniture Co., Inc. Atty: Tenzer, Greenblatt, etc. 235 E. 42nd St., NYC	Rental
2-13-69	375.07	S	Gen Camera Corp. Atty: Scioscia & Lashley 16 Court St., Bklyn	Rental
7/17/70	99.75	S	Beacon Temporary Office Service Inc. Atty. R. Becher 160 B'way, NYC	WL
7/27/70	500.00	S	American International Underwriters Corp. Atty. M. Seberl 156 Wm. St., NYC	PR
Take Two Inc. NS Kates, Jerome, NS 80 5th Ave., NYC				
7/31/70	3,254.00	S	Western Costume Leasing Co. Atty. Kazlow & Kazlow 437 5th Ave., NYC Served at 80—5th Avenue, NYC	GS
Take Two, Inc.				
10/8/70	2729.58	S	Opticals East, Inc. Attys: Krause, Hirsch Etc. 41 E. 42nd St., NYC	WL
8/19/70	275.00	S	Lawrence Serves Industry Inc. Attys: Abrams & Cowan 250 W. 57th St., NYC	SV

Confidential Litigation Record Prepared for Franklin National Bank.

Date	Amt.	S or J	Plaintiff	Nature of Action
8/19/70	665.60	S	Lawrence Personnel Agency, Inc. Attys: Abrams & Cowan 250 W. 57th St., NYC	SV
2-5-70	53.80	S	Long Island Insurance Co. Atty: Marcus Seberl 156 Wm St., NYC	PR
Kates, Jerome B.			Address not stated	
12-13-68	1,200.00	J	City of N.Y.	Judg
Take Two Inc. & Jerry Kates			Address not stated	
1-10-69	326.00	J	L. Jacobs	Judg
Take Two Inc.			Address not stated	
6-18-68	13,227.00	J	V. Guest	Judg
8-11-69	138.00	J	Russell Motors	Judg
Record On: Take Two Inc. Address: 80—5th Avenue NYC Take Two Inc. 80 5th Ave., NYC				
5/6/70	424.80	S	United Recording Labs Inc. Atty. L. Entin 32 B'way, NYC	GS
6/12/70	407.47	S	Camera Mart Inc. Atty. Florman, Goldstein, etc. Add. 84 Wm. St., NYC	GS
6/22/70	268.52	S	Beiss Bros. Atty. N. Bluestone 26 Court St., Bklyn., N.Y.	GS
9/9/70	1060.00	S	581—10th Avenue Corp. Attys: Coudert Bros. 200 Park Avenue NYC	AG

Confidential Litigation Record Prepared for Franklin National Bank.

Date	Amt.	S or J	Plaintiff	Nature of Action
9/14/70	8418.55	S	Zelma Ackerman, As Assignee of Societe Cenematographique Det. Studios "La Victorine" Atty: Edward N. Ackerman 138-16 76th St., Qns.	WL
9/21/70	82.00	S	Temp. Office Services, Inc. Attys: Eisenberg & Solomon Lake Success, NY	SV
Take Two, Inc.			Served at 78—5th Avenue NYC	
8/6/70	2325.00	S	National Helicopter Service & Engineering Co. Atty: Morris Bogash 55 W. 42nd St., NYC	SV
8/6/70	1248.75	S	N TT Enterprises Inc. dba Tyler Camera Systems Atty: Morris Bogash 55 W. 42nd St. NYC	RC
Take Two, Inc.			Served at; 80 5th Ave., NYC	
8-18-70	1,580.86	S	Zane & Zane Atty: Zane & Zane 1 Rockefeller Pl., NYC	WL
			Judgment entered 8-26-70 $1,693.14	
10-9-70	415.00	S	Double Image, Inc. Atty: S.M. Klein 666 5 Ave., NYC	SV, GS
10-23-70	1,513.63	S	Jaris Trading Co., Inc. Atty: Trachtenberg & W 500 5 Ave., NYC	WL
11-6-70	220.50	S	Scenic Backgrounds Inc. Atty: M. Bogash 55 W. 42nd St., NYC	WM

Confidential Litigation Record Prepared for Franklin National Bank.

Date	Amt.	S or J	Plaintiff	Nature of Action
11-9-70	1,106.70	S	Video Tape Products of NY Inc Atty: Black & B. 90-50 Parsons Blvd., Queens	AG
11-17-70	280.21	S	Morse Associates, Inc. Atty: Stozin & S 250 W 57 St., NYC	AG
12-21-70	1,860.15	S	Ocean Science & Engineering Inc. Atty: Leibowitz & Platzer 299 Bway, NYC	AG

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 26—September Term, 1976.

(Argued October 18, 1976 Decided January 3, 1977.)

Docket No. 76-7166

SAMUEL MALLIS and FRANKLYN KUPFERMAN,

Plaintiffs-Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, EUROPEAN-AMERICAN BANK & TRUST COMPANY, FRANKLIN NATIONAL BANK and BANKERS TRUST COMPANY,

Defendants-Appellees.

Before:

SMITH, OAKES and TIMBERS,

Circuit Judges.

Appeal from judgment entered in the Southern District of New York, Milton Pollack, *District Judge*, 407 F.Supp. 7, dismissing complaint for failure to state claims upon which relief can be granted and denying leave to amend complaint in action to recover damages and for other relief resulting from alleged violations of Regulation U of the Board of Governors of the Federal Reserve System and of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.

Opinion of the Court of Appeals.

Affirmed as to dismissal of Regulation U claim; as to dismissal of Securities Exchange Act claim, reversed and remanded with directions.

NOEL W. HAUSER, New York, N.Y. (Hauser & Rosenbaum, New York, N.Y., on the brief), *for Plaintiffs-Appellants.*

JACK H. WEINER, New York, N.Y. (Charles Leeds, New York, N.Y. on the brief), *for Defendant-Appellee Bankers Trust Company.*

PHILIP K. HOWARD, New York, N.Y. (John L. Warden, and Sullivan & Cromwell, New York, N.Y., on the brief), *for Defendant-Appellee European-American Bank & Trust Company.*

ROBERT S. ANDERSON, New York, N.Y. (Hughes Hubbard & Reed, New York, N.Y., on the brief), *for Defendant-Appellee Franklin National Bank.*

TIMBERS, *Circuit Judge:*

This appeal is from a judgment entered in the Southern District of New York, Milton Pollack, *District Judge*, 407 F.Supp. 7, dismissing the complaint for failure to state claims upon which relief can be granted and denying leave to amend the complaint in an action to recover damages and for other relief resulting from alleged violations of Regulation U of the Board of Governors of the Federal Reserve System, 12 C.F.R. § 221 (1976), and alleged viola-

tions of the antifraud provisions of the federal securities laws, including Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1970), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5 (1976).

The essential questions which we find presented and our rulings thereon are as follows:

(1) Whether a bank loan to appellants by Franklin National Bank was subject to Regulation U.

We hold that it was not.

(2) Whether appellants as pledgees of stock certificates of Equity National Industries, Inc. have standing to sue under Section 10(b) and Rule 10b-5.

We hold that they do.

For the reasons below, we affirm the dismissal of the Regulation U claim against European-American Bank & Trust Company and Franklin National Bank; but as to the dismissal of the Securities Exchange Act claim against the Bankers Trust Company, we reverse and remand with directions.

I. Facts

Appellants Mallis and Kupferman are dentists.[1] Between March 1 and March 3, 1972 Jack J. Arnold, an attorney, persuaded them to make a short term loan of $156,000 to himself and his client, John B. Fowler, to finance the purchase of 40,034 shares of stock in Equity National Industries, Inc. (Equity National). The consideration to appellants was to be $50,000. In addition, appellants were to receive possession of the Equity National stock certificates as collateral. To fulfill their part of the

[1] We assume familiarity with the comprehensive statement of facts in the district court opinion. 407 F.Supp. at 9-10.

agreement, appellant immediately obtained a loan of $156,000 from appellee Franklin National Bank (Franklin National). The parties dispute whether this loan was to have been secured in turn by the Equity National certificates. This issue was not resolved by the district court.

Title to the Equity National shares desired by Arnold and Fowler was in Jerome and Judith Kates. But the certificates were in the possession of the Bankers Trust Company (Bankers Trust), to which the Kateses had pledged the shares as collateral for a loan. The Kateses still owed $45,000 on this loan on March 3, 1972.

The shares, which the Kateses had acquired pursuant to a merger between a corporation under their control and Equity National, were subject to an escrow agreement which required the return of the certificates to Equity National for cancellation or reissue depending on whether the acquired corporation met specified earnings conditions. Each certificate bore a legend which declared it to be subject to the escrow agreement and restricted transfer except in accordance with the terms of the agreement. Although other Equity National shares of the same series were registered under the Securities Act of 1933 and listed on the American Stock Exchange (Amex), the shares issued to the Kateses were not.

By a letter to Bankers Trust, Equity National had recalled the Kateses' shares for cancellation in March 1971. As a result the shares were worthless when the transactions here at issue occurred in March 1972.

A closing was held on March 3, 1972. Arnold and Fowler, the Kateses, and representatives of Franklin National and Bankers Trust were in attendance, but not appellants. Franklin National's representative delivered three checks totalling $156,000 to the Kateses. The Kateses endorsed one of the checks in amount of $45,000 to Bankers Trust. Bankers Trust then released the Equity National Certificates. The Kateses transferred the certificates to Arnold

and Fowler who subsequently delivered them to appellants in accordance with the loan agreement.

The instant action arises from the failure of Arnold and Fowler to repay their loan from appellants. In the district court appellants sought to assert two claims. First, they sought relief against Franklin National, now insolvent, and the European-American Bank & Trust Company (European-American), which purchased appellants' note along with Franklin National's other assets.[1] They sought rescission of their loan from Franklin National on the ground that the loan was made for the purpose of acquiring margin stock in an amount in excess of the maximum loan value of the stock in violation of Regulation U.[2] Second, they alleged that Bankers Trust violated the Securities Act of 1933 in disposing of the unregistered Equity National shares in the course of terminating their pledge agreement with the Kateses. During the course of proceedings in the district court appellants departed from this theory, which apparently looked to Section 12(1) of the 1933 Act, 15 U.S.C. § 771(1)(1970), and requested leave to amend their complaint to state a cause of action under Section 10(b) of the 1934 Act and Rule 10b-5 thereunder.

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[1] The successors in interest to insolvent Franklin National are European-National and the Federal Deposit Insurance Corporation (FDIC).

As the receiver of Franklin National, FDIC was named in the complaint as a defendant with respect to appellants' Regulation U claim. Appellants since have stipulated to dismissal of their action against FDIC. Although Franklin National remains as a party, appellants no longer seek a money judgment against it.

[2] The complaint also alleged a pendant claim against Franklin National based on common law fraud. After dismissing appellants' federal claim against Franklin National, the district court dismissed the pendant claim for lack of subject matter jurisdiction and denied leave to amend it to assert a cause of action against Franklin National under the Securities Exchange Act. Appellants since have stipulated to the dismissal of both of these claims.

The theory underlying their claim against Bankers Trust is that it knowingly misrepresented that the certificates no longer were subject to the escrow agreement.

European-American, Franklin National and Bankers Trust moved to dismiss the complaint for failure to state claims upon which relief can be granted. The court granted the motions and dismissed the complaint in its entirety. In granting the motions of European-American and Franklin National to dismiss the Regulation U claim, the court held that Franklin National's loan was not made for the purpose of carrying or purchasing margin stock within the meaning of Regulation U. In granting the motion of Bankers Trust to dismiss, the court held that appellees, as pledgees, were not "purchasers" of securities and therefore could not state a claim under the 1933 Act. For the same reason the court denied leave to appellants to amend their complaint to allege a claim under Section 10(b) of the 1934 Act and Rule 10b-5.

From the judgment dismissing the complaint and the order denying leave to amend, this appeal has been taken.[3]

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[3] Appellants' notice of appeal filed March 24, 1976 is "from the Order and Judgment of the Hon. Milton Pollack".

Judge Pollack's opinion ordering dismissal of the complaint was filed September 30, 1975. On December 5, 1975, on motion of appellants' counsel, the judge filed a Rule 54(b) certificate directing the entry of a final judgment with respect to all defendants except FDIC so as to permit the instant appeal. We note that Judge Pollack's Rule 54(b) certificate complies with the approved practice in this Circuit that the required determination that there is no just reason for delay "ought not to be made as a matter of rote". *Arlinghaus* v. *Ritenour*, —— F.2d ——, —— (2 Cir. 1976), slip op. 239, 243 (October 26, 1976); *Gummer* v. *Shearson, Hammill & Co., Inc.*, 516 F.2d 283, 286 (2 Cir. 1974). Judge Pollack's finding that "[t]here is no just reason for leaving the claim against FDIC hanging in limbo and creating piecemeal appellate litigation" produced the additional therapeutic result of appellants' dismissal of their action against FDIC. See note 2, *supra*.

(footnote continued on following page)

The district court dismissed appellants' Regulation U claim for rescission against European-American and Franklin National on the ground that Regulation U does not apply to the loan in question. 407 F.Supp. at 10-11. We agree.

Regulation U prohibits banks from extending credit,

> "directly or indirectly . . . for the purpose of purchasing or carrying any margin stock in an amount exceeding the maximum loan value of the collateral. . . ." 12 C.F.R. § 221.1(a) (1976).[3]

The only definition of "margin stock" set forth in Regulation U which even approaches applicability to the instant shares is that of "a stock registered on a national securities exchange". 12 C.F.R. § 221.3(v) (1).[4] Although other shares

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(*footnote continued from preceding page*)

However, since "[e]very good case requires a mystery document", *Westchester Fire Insurance Company* v. *Tantalo*, 273 F. Supp. 7, 12 n. 5 (D. Conn. 1967), it appears that the mystery document here is the judgment itself. Our search of the voluminous appendix and original district court record has failed to uncover any document that looks like a judgment. Since the parties and the district court have proceeded on the assumption that there was an adjudication of dismissal, we decline to stand on the technicality of the missing mystery document in this case.

[3] "Maximum loan values" are set forth in 12 C.F.R. § 221.4 (1976).

[4] 12 C.F.R. § 221.3(v) (1976) defines "margin stock" as:

> ". . . (1) a stock registered on a national securities exchange, (2) an OTC margin stock, (3) a debt security (i) convertible with or without consideration, presently or in the future, into a margin stock, or (ii) carrying any warrant or right to subscribe to or purchase, presently or in the future, a margin stock; (4) any such warrant or right, (5) any security issued by an investment company licensed under the Small Business Investment Company Act of 1958 . . . registered pursuant to section 8 of the Investment Company Act of 1940 . . . unless at least 95 percent of the assets of such company are continuously invested in exempted securities."

of the same series were listed on the Amex, the particular Equity National shares here in question were not listed on any national securities exchange. They therefore were not "margin stock" so as to trigger the application of Regulation U to the Bankers Trust loan.[5]

Moreover, appellants were neither "purchasing" nor "carrying" stock within the meaning of Regulation U. 12 C.F.R. § 221.1(a), *supra*. The Regulation specifically brings within its ambit credit extended to a bank customer engaged "principally, or as one of the customer's important activities, in the business of extending credit for the purpose of purchasing or carrying margin stocks. . . ." 12 C.F.R. § 221.3(g) (1976). Under the circumstances of this case, we construe this provision to state conditions which must be met before the Regulation will apply to an intermediate borrower who reloans the funds to enable another to purchase stock. Appellants, the intermediate borrowers here, had an independent interest in the transaction and bore an independent risk. We therefore need not decide whether we would construe § 221.3(g) otherwise if the intermediate loan were a sham entered into to circumvent the Regulation's application. Since borrowing for the purpose of relending to enable others to purchase or carry margin stock was not one of appellants' "important activities", we hold that Regulation U does not apply to the Franklin National loan.

Furthermore, European-American would be insulated from appellants' rescission claim even if Regulation U were applicable here. Section 29(c)(2) of the 1934 Act, 15 U.S.C. § 78cc(c)(2) (1970), bars construction of the Act or any regulation promulgated under it to afford a defense against "the collection of any debt . . . by any person who

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[5] We agree with the district court's holding that the fact that other shares of the same series were listed on the Amex does not alter the result. 407 F.Supp. at 10-11.

shall have acquired [it] in good faith for value and without actual knowledge of the violation" of the Act or regulation. Regulation U was promulgated pursuant to Section 7 of the 1934 Act, 15 U.S.C. § 78g (1970). European-American's payment of value for appellants' obligation, its good faith, and its lack of actual knowledge of any underlying irregularity are not disputed. Accordingly, even if Regulation U were otherwise applicable, we hold that Section 29(c)(2) would bar appellants from asserting their rescission claim against European-American.

III. Securities Exchange Act Claim

This brings us to what we regard as the chief question in the case: whether appellants have standing to sue under Section 10(b) of the 1934 Act and Rule 10b-5. Specifically, the issue is whether under the definition of "sale" in Section 3(14) of the 1934 Act, 15 U.S.C. § 78c(14) (1970), a pledge fulfills the familiar requirement that the fraud occur "in connection with the purchase or sale" of a security.

In resolving the standing question against appellants, the district court relied on *McClure* v. *First National Bank of Lubbock*, 497 F.2d 490 (5 Cir. 1974), *cert. denied*, 420 U.S. 930 (1975). There the court acknowledged that a pledgor might be liable for fraud under Section 10(b) after his default and a consequent sale of the securities by the pledgee, but held that the pledge itself did not constitute a "sale". At the time of the decision below in the instant case, the district court did not have the benefit of our subsequent decision which rejected the rationale of *McClure* in a case arising under Section 17(a) of the 1933 Act. *United States* v. *Gentile*, 530 F.2d 461 (2 Cir.), *cert. denied*, —— U.S. —— (1976). We hold that *Gentile* and our earlier decision in *SEC* v. *Guild Films Co.*, 279 F.2d 485 (2 Cir.), *cert. denied*, 364 U.S. 819 (1960), control here and require that appellants be granted standing.

In *Guild Films* we held a pledge of stock to be a "sale" within the meaning of Section 2(3) of the 1933 Act, 15 U.S.C. § 77b(3) (1970),[*] in the context of determining that the pledgees there involved were "person[s] who [have] purchased from an issuer" within the meaning of the definition of "underwriter" in Section 2(11) of the 1933 Act, 15 U.S.C. § 77b(11) (1970). *SEC* v. *Guild Films Co.*, *supra*, 279 F.2d at 489.[*] *Gentile* reaffirmed and expanded this holding. The defendant there was charged with a conspiracy to pledge fraudulently issued securities in violation of Section 17(a) of the 1933 Act, 15 U.S.C. § 77q(a) (1970). We again held a pledge to constitute a "sale" within Section 2(3), this time to satisfy the requirements of Section 17(a) that the fraud occur "in the offer or sale of any securities". *United States* v. *Gentile*, *supra*, 530 F.2d at 466-67. We held:

> "In effect, the pledgee assumes a very real investment risk that the pledged securities will have continuing value, a risk that is identical in nature to the risk taken by investors which serves as the indisputable basis for statutory regulation of securities transactions. We therefore find no reason to treat the equivalent risks differently under the statute." *Id.* at 467.[*]

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[*] Section 2(3) defines a "sale" to include "every contract of sale or disposition of a security or interest in a security for value."

[*] We reasoned that the term "purchaser", "although not defined in the Act, should be interpreted in a manner complementary to 'sale'." *SEC* v. *Guild Films Co.*, *supra*, 279 F.2d at 489.

[*] In rejecting the distinction drawn in *McClure* between the pledged shares while in the pledgee's possession and the same shares after a sale due to the pledgor's default, we stated:

> "We see no reason to make the character of the initial pledge dependent upon subsequent events." *United States* v. *Gentile*, *supra*, 530 F.2d at 467 n. 6.

The fact that *Gentile* was a criminal case in which civil standing was not an issue does not diminish its persuasion as a precedent with respect to the Section 10(b) claim before us. The existence of a "sale" is as essential to a criminal prosecution for violation of Section 17(a) as it is to a civil action under that section. We find no basis on the face of either the 1933 Act or the 1934 Act for denominating a pledge as a "sale" for criminal but not for civil purposes.

Nor would the standing policy enunciated by the Supreme Court in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), support such a conclusion. We recognize that the Court there expressed concern about vexatious suits by a potentially limitless class of plaintiffs. We further recognize that the granting of standing to pledgees creates potential plaintiffs where none might have existed. But a closer look at *Blue Chip* demonstrates that the specific concerns there expressed by the Court have no bearing on the question before us of granting standing to pledgees. The Court in *Blue Chip* had before it a plaintiff who claimed that the defendant's misrepresentations caused it to refrain from purchasing securities. The Court observed that the rule of *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2 Cir.), *cert. denied*, 343 U.S. 956 (1952), requiring a purchase or sale, had the virtue of excluding a class of plaintiffs who had not dealt in the security at all and whose cases as a result would stand or fall on oral testimony. Requiring that the plaintiff have "dealt in" the security would assure that each case stand upon at least one "objectively demonstrable fact." *Id.* at 746-47. A pledge which occurs pursuant to a loan contract is just as concrete a transaction as is a normal transfer of title.[11]

[11] Bankers Trust seeks to distinguish *Gentile* and *Gould Films* from the instant case on the further ground that neither of the pledges involved in those cases were bona fide. We fail to see

(footnote continued on following page)

We believe that the rationale underlying our holding in *Gentile* with respect to Section 2(3) and 17(a) of the 1933 Act is persuasive authority for holding that a pledge constitutes a "contract to sell or otherwise dispose of" a security within the meaning of Section 3(14) of the 1934 Act. Accordingly, on the facts of this case, we hold that both a "sale" and a "purchase" may be cognizable under Section 10(b) of the 1934 Act. Appellants were purchasers by virtue of their acceptance of the pledge by Arnold and Fowler; and Bankers Trust was a seller by virtue of its release of the Kateses' pledge.

We therefore reverse the dismissal of appellants' Securities Exchange Act claim and remand the case to the district court with directions to grant leave to appellants to amend their complaint in accordance with this opinion. See *Rogers* v. *White Metal Rolling & Stamping Corp.*, 249 F.2d 262 (2 Cir. 1957), *cert. denied*, 356 U.S. 936 (1958).[12]

Affirmed as to the dismissal of the Regulation U claim against European-American and Franklin National; but as to the dismissal of the Securities Exchange Act claim against Bankers Trust, reversed and remanded with directions to grant leave to appellants to amend their complaint in accordance with this opinion.[13]

(footnote continued from preceding page)

what connection the pledgor's state of mind has with the question whether the pledgee has standing to sue. Such a distinction would be at odds with our rationale in *Gentile*.

[12] Bankers Trust also contends that the dismissal of an earlier common law fraud action brought against it and others by appellants in the New York state courts should have a collateral estoppel effect so as to bar appellants' claim under Section 10(b). This defense is a matter for trial which we do not reach now. But see *Herendeen* v. *Champion International Corp.*, 525 F.2d 130 (2 Cir. 1975).

[13] Having given due consideration to the motion by counsel for European-American for an award of attorneys' fees and double costs, we deny it.

Judgment of the Court of Appeals—United States Court of Appeals for the Second Circuit.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of January one thousand nine hundred and seventy-seven.

Present: Hon. J. Joseph Smith
Hon. James L. Oakes
Hon. William H. Timbers
Circuit Judges,

76-7166

Samuel Mallis and Franklin Kupferman,

Plaintiffs-Appellants,

v.

Federal Deposit Insurance Corporation, European-American Bank & Trust Company, Franklin National Bank and The Bankers Trust Company,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order and judgment of said

Judgment of the Court of Appeals—United States Court of Appeals for the Second Circuit.

District Court be and they hereby are affirmed in part and reversed in part and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to be taxed against the plaintiffs-appellants in favor of defendant appellee European American Bank & Trust Company and against defendant-appellee Bankers Trust Company in favor of plaintiffs-appellants.

A. Daniel Fusaro
Clerk

by Arthur Heller
Deputy Clerk

Order of the Supreme Court of the United States, Granting the Petition for a Writ of Certiorari.

SUPREME COURT OF THE UNITED STATES

No. 76-1359

Bankers Trust Company,

Petitioner,

v.

Samuel Mailis and Franklyn Kupferman

ORDER ALLOWING CERTIORARI Filed May 23, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.